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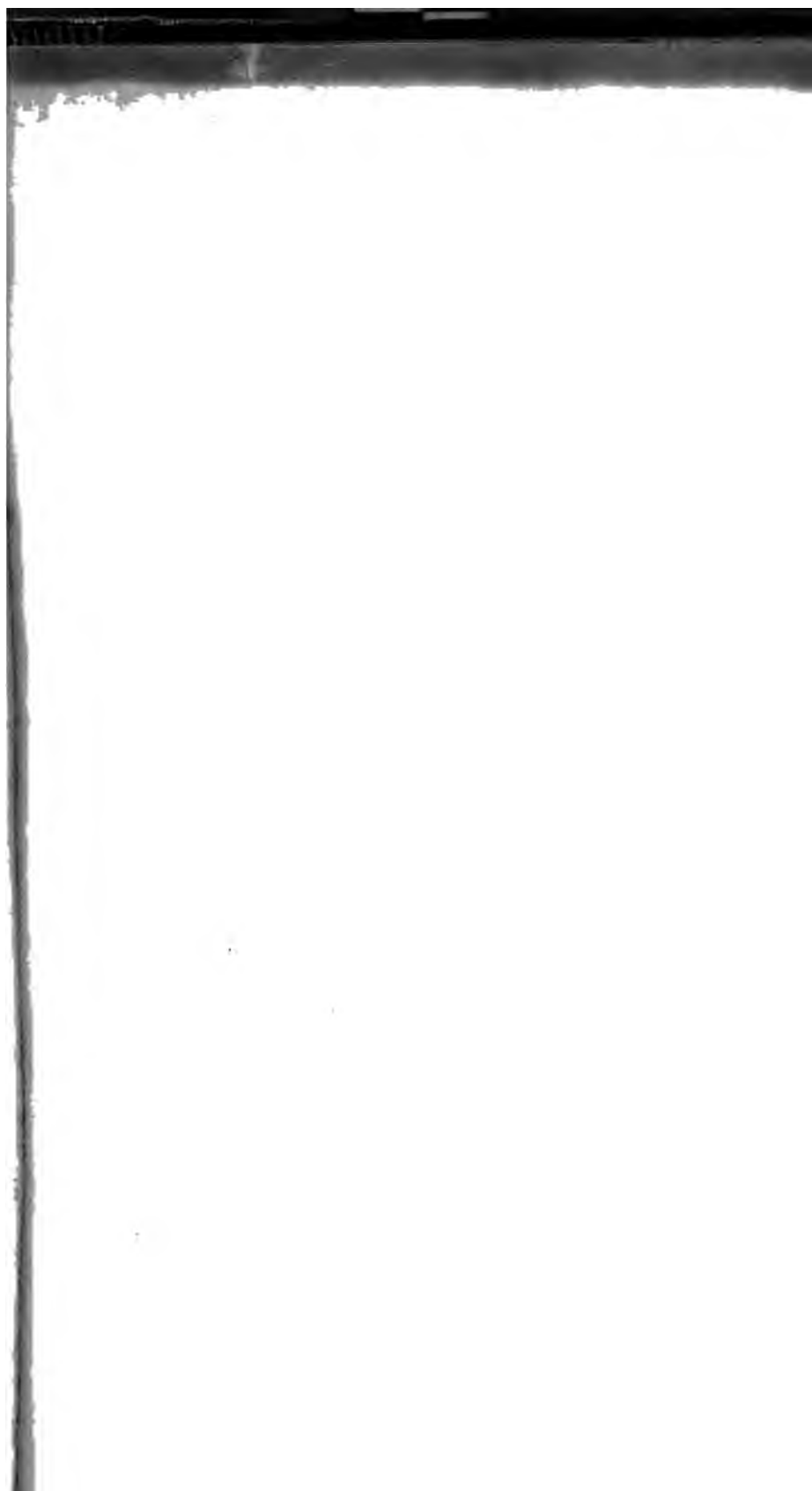
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**REPORTS**  
**OF**  
**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**HIGH COURT OF CHANCERY**  
**DURING THE TIME OF**  
**LORD CHANCELLOR COTTENHAM.**

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**BY**  
**J. W. MYLNE, AND R. D. CRAIG, Esqs.**  
**BARRISTERS AT LAW.**

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**VOL. V.**  
**1839, 40, 41. — 3 & 4 VICTORIA.**

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**1848.**





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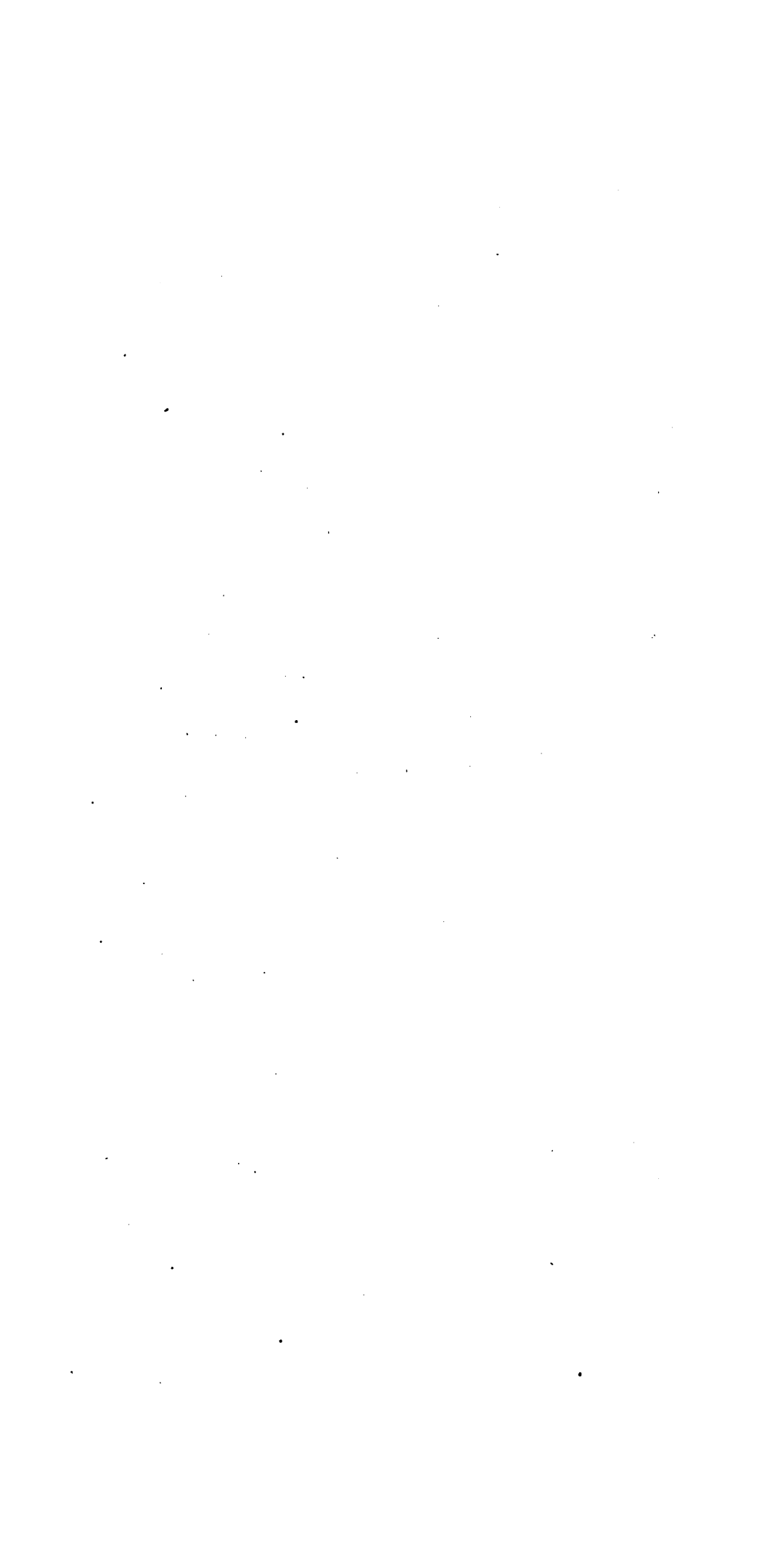
Lord COTTENHAM, *Lord Chancellor.*

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor.*

Sir JOHN CAMPBELL, *Attorney-General.*

Sir ROBERT MONSEY ROLFE, }  
Sir THOMAS WILDE, } *Solicitors-General.*



A

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**VOL. I.**

**In Table of Cases, insert**

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Clack, Attorney-General v. page 367."**

**VOL. IV.**

**Page 257. line 15. after " motion," insert " before the Vice-Chancellor."**



# REPORTS

OF

## CASES

ARGUED AND DETERMINED

1839.

IN THE

HIGH COURT OF CHANCERY.

SAINSBURY v. JONES.

Nov. 15. 18.

**T**HE facts of this case are stated in the second volume of Mr. Beavan's Reports. (a)

It seems desirable to add to that report the statement, that, in the month of *December* 1834, the Plaintiff filed a supplemental bill, stating that, since the filing of the original bill, the Defendant *Jones* had been found to have been a lunatic from the year 1799, and making the committees of his estate defendants. In the month of *July* 1837, upon the death of *Jones*, the Plaintiff filed a bill of revivor against the Defendant *Margaret Doggerell*, as his heiress at law.

*C.* contracted, as agent of *A.* and *B.*, to sell an estate to *D.*, and received a deposit in part payment of the intended purchase money. *C.*'s agency was afterwards denied by *A.* and *B.*, and *D.* then filed a bill against *A.*, *B.*, and *C.*, praying a specific performance, and praying, in the alternative,

The

(a) Page 462.

that if he should be unable to obtain a specific performance, *C.* might be decreed to return the deposit, and to reimburse to the Plaintiff all the expenses of endeavouring to enforce the contract. The bill was dismissed, with costs, as against *C.* as well as against *A.* and *B.*; and the dismissal was affirmed, on appeal.

VOL. V.

B



1839.  
  
 SAINSBURY  
 v.  
 JONES.

The Plaintiff now appealed from the decree of the Master of the Rolls, so far as it had dismissed the bill with costs, as against the Defendant *Chitty*.

Mr. *Girdlestone* and Mr. *Hetherington*, in support of the appeal.

Mr. *Cooper* and Mr. *Dixon*, in support of the decree.

Nov. 18.

*The* LORD CHANCELLOR.

The contract in this case was entered into and signed by *Chitty*, but, professedly, and in terms, as agent for *Jones* and *Doggerell*, the owners of the house which the Plaintiff agreed to purchase; and the bill alleges that the 20*l.* deposit was paid to *Chitty*, "as such agent as aforesaid."

The bill was dismissed at the Rolls; and the Plaintiff acquiesces in the decree, so far as it dismissed the bill against *Jones* and *Doggerell*, the owners of the house, but insists that there ought to have been a decree against *Chitty*, who was made Defendant by amendment; and the case made against him was, that if, by reason of the lunacy of *Jones*, *Chitty* had not authority to enter into the contract, then he, in so doing, had practised a fraud upon the Plaintiff; and it prayed, in the alternative, that if the Plaintiff should not be able to obtain a specific performance, *Chitty* might return the deposit, and reimburse the Plaintiff all the costs and charges which he had incurred in endeavouring to enforce the contract.

The owners of the property not being parties to the appeal, and all title to a specific performance being abandoned, the case is just as it would have been, if, originally, the Plaintiff had filed a bill against *Chitty* alone, stating that he could not enforce a specific performance,

formance, and praying a return of the deposit, and compensation for the expense incurred under the contract, against *Chitty*.

1839.  
  
 SAINSBURY  
 v.  
 JONES.

That this relief, if the Plaintiff can make out a proper case for it, might have been had at law, is not disputed. The two cases of *Bratt v. Ellis* and *Jones v. Dyke* (a) are directly in point; but it is argued that this Court has concurrent jurisdiction. Now the claim is for a return of the deposit paid to *Chitty*, as agent for *Jones* and *Doggerell*, and for damages for the injury sustained by the Plaintiff, from the Defendant having entered into a contract of which the Plaintiff cannot obtain a specific performance.

I certainly recollect the time at which there was a floating idea in the profession that this Court might award compensation for the injury sustained by the nonperformance of a contract, in the event of the primary relief for a specific performance failing; and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long to recollect the time when the decision of Lord *Kenyon* in *Denton v. Stewart* (b) had not been formally overruled; but, at that time, very little weight was attached to it, and very few instances occurred in which Plaintiffs were advised to ask any such relief; and, for a short time, Sir *W. Grant's* decree in *Greenaway v. Adams* (c) added something to the authority of *Denton v. Stewart*, although he threw out strong doubts as to the principle of that case. This, however, lasted but a short time, for, *Greenaway v. Adams* occurring in 1806, Lord *Eldon*, in 1810, in *Todd v. Gee* (d), expressly overruled *Denton v. Stewart*; and, from that time, there

has

(a) 3 *Sugden's Vendors and Purchasers*, App. vii. and viii.  
 (b) 1 *Cox*, 258.

(c) 12 *Ves.* 395.  
 (d) 17 *Ves.* 273.

1839.  
  
 SAINSBURY  
 v.  
 JONES.

has not, I believe, been any doubt upon the subject. Certainly, during the thirty years which have elapsed since that time, I have never supposed the granting any such relief as being within the jurisdiction of this Court. Indeed, before that case, Sir *W. Grant*, in 1807, in *Gwillim v. Stone* (a), refused to follow his own decision in *Greenaway v. Adams*, because the Plaintiff did not ask a specific performance; that is, in a case precisely the same as the present; for, upon this appeal, the Plaintiff does not ask a specific performance.

Had it been supposed that this Court had the jurisdiction contended for, every bill for a specific performance would have prayed compensation, in the event of the vendor proving not to have a good title. It is true that, in this case, the compensation sought is not against the vendor, but against a person who falsely assumed authority to sell; but this places the case still wider from the principle upon which this Court exercises its jurisdiction in cases of contract; because, as against such agent, there is no case of contract, but a mere claim for compensation, for damages arisen from there being none which the purchaser can enforce.

As to the 20*l.* deposit, if the suit cannot be maintained upon other grounds, it certainly cannot be supported in merely seeking a return of that small sum. That also is a claim at law. In *Williams v. Edwards* (b) and *Kendall v. Beckett* (c) this Court refused to grant such relief. In this case, however, the question does not arise; because the agreement and the bill state that the deposit was paid to *Chitty*, on account of *Jones and Doggerell*; and no person is now before the Court representing their interest.

It

(a) 14 *Ves.* 128.

(b) 2 *Sim.* 78.

(c) 2 *Russ. & Mylne*, 88.

It is unfortunate if, in prosecuting this claim in this Court, the Plaintiff has lost his remedy at law ; but that cannot affect the decision of this case ; and I cannot but observe that, so early at least as *December 1834*, the Plaintiff had full information of the facts of the case ; for at that time he filed his supplemental bill against the committees of *Jones*. He then knew that he could not compel a specific performance of the contract ; and having sought compensation for damages in a court which had not jurisdiction to award them, I think the decree of the Master of the Rolls, dismissing the bill, with costs, as against *Chitty*, was correct ; and I am under the necessity of now adding to such costs the costs of the appeal.

1839.  
SAINSBURY  
v.  
JONES.

The appeal must be dismissed, with costs.

WORMALD v. MACKINTOSH.

1840.  
Jan. 24, 25.  
Nov. 12.

THE question which, in this case, came before the Lord Chancellor upon an appeal from an order of the Master of the Rolls was, whether a person, named *Stafford Price*, who had become guarantee for the payment of a debt secured by a second mortgage, was a competent witness, *vivâ voce* before the Master, to prove that the first mortgage had, by certain dealings and transactions between the mortgagor and the first mortgagees,

A person, who had guaranteed the payment of a debt secured by a second mortgage, was tendered, in a suit relating to the first mortgage only, as a witness, *vivâ voce*, before the Master, to

prove that, by certain dealings and transactions between the mortgagor and the first mortgagees, but to which he had happened to be a party, the first mortgage had been, in part, satisfied ; and he stated, on the *voir dire*, that he had ascertained that the mortgaged property was sufficient to pay both the first and second mortgages : Held, that his evidence was admissible.

1840.  
  
 WORMALD  
 v.  
 MACKINTOSH.

to which he happened to have been a party, been, to a certain extent, satisfied; the question of such partial satisfaction being raised in a suit which related to the first mortgage only, and had no reference to the second mortgage, and to which the second mortgagee was no party, and the witness stating, on the *voir dire*, that he had ascertained that the property was of sufficient value to satisfy both the first and the second mortgages.

The particular circumstances under which the question arose, and under which it came before the Court, are very fully detailed in the Lord Chancellor's judgment.

Mr. *Wigram*, in support of the admissibility of the evidence, cited *Collins v. Gwynne* (a), *Rex v. Cole* (b), *Paull v. Brown* (c), *Clarke v. Gannon* (d), *Nowell v. Davies* (e), *Marsden v. Stansfeld* (g), *Phillipps on Evidence*. (h)

Mr. *Richards* and Mr. *Wright*, *contra*, contended that the evidence was inadmissible, and referred to *Doe dem. Lord Teynham v. Tyler* (i), *Hawkins v. Inwood*. (k)

Mr. *Wigram*, in reply.

Nov. 12.

The LORD CHANCELLOR.

It is necessary, in order to come to a right conclusion as to the admissibility of the evidence of Mr. *Stafford Price*, which was received by the Master, but, upon exceptions,

(a) 2 *Moore & Scott*, 640.

(b) 1 *Esp.* 169.

(c) 6 *Esp.* 34.

(d) *Ry. & M.* 51.

(e) 5 *B. & Adol.* 368.

(g) 7 *B. & C.* 815.

(h) 8th edit. p. 117. *et seq.*

(i) 6 *Bing.* 390. 561.

(k) 4 *Car. & P.* 148.

ceptions, rejected by the Master of the Rolls, very accurately to consider the matter in issue between the parties, upon the reference to the Master.

1840.  
  
 WORMALD  
 v.  
 MACKINTOSH.

The Defendant, having mortgaged the property in question to *Taylor & Co.*, they, on the 4th of *November 1825*, borrowed money of the Plaintiff, upon the security of this mortgage, and a deposit of the deeds. The original decree of 1829 declared that the Plaintiff was entitled to stand in the place of *Taylor & Co.* for the amount due to them at the time of such deposit; but without prejudice to any question in respect of subsequent payments made by the Defendant to *Taylor & Co.* prior to notice of such deposit.

By an order of Sir *J. Leach*, of the 15th of *June 1832*, upon exceptions to the Master's report, it was declared that the Plaintiff was entitled to be considered as a creditor, on the security of the property, for 2000*l.* and interest, unless it should appear, by the general dealings between the Defendant and *Taylor and Co.* since the date of the mortgage, that any sum or balance was due to the Defendant; and, in that case, it was declared that the Defendant was entitled to set off such sum or balance against the said sum of 2000*l.* and interest; and the Master was directed to take an account of all dealings and transactions between the Defendant and *Taylor and Co.*, and to ascertain what, if anything, was due to the Defendant. In pursuing this inquiry, a question arose as to whether the amount of a bill of exchange for 1000*l.*, dated the 24th of *September* and due the 27th of *December 1825*, and marked Q., ought to be placed to the credit of the Defendant with *Taylor and Co.* This bill was drawn by the Defendant upon Mr. *Stafford Price*, and discounted through *Taylor and Co.* The Plaintiff insisted that this was not a payment to

1840.  
  
 WORMALD  
 v.  
 MACKINTOSH.

*Taylor* and Co., for that they had themselves taken it up; but the Defendant insisted that it was, it having been taken up by *Stafford Price* the acceptor: and, upon an order, of the 8th of *March* 1837, by which it was referred to the Master to enquire and state to the Court by whom, and in what manner, this bill was taken up, the Defendant insisted, before the Master, that this bill had been taken up by *Stafford Price* the acceptor, through the medium of his bankers, and out of his moneys; and he tendered *Stafford Price* as a witness to prove this statement, who stated that one *Charles Finch* was a second mortgagee of the same premises for 1000*l.*, and that he (*Stafford Price*) had guaranteed this mortgage debt, and that, if the estate was not sufficient, he should have to pay the debt, but that he had ascertained that the estate was sufficient.

The Master admitted this evidence; but, upon exceptions taken to the report, the Master of the Rolls was of opinion that *Stafford Price* was not a competent witness, upon the ground of interest; as the object of his evidence was to shew that the first mortgage was, to a certain extent, satisfied, and thereby to improve the security of the second mortgage, which he had guaranteed, and, therefore, to diminish the probability of his being called upon to pay the amount; and the question is, whether that be a correct application of the rule of law. There can be no doubt that such may be the effect of the evidence of this witness; but the subject matter to which the witness is called upon to depose is, incidentally, only, connected with the interest of the witness. It does not touch the value of the mortgaged property, or the amount of the mortgage debt, but relates to other transactions quite unconnected with those matters; except that the Court has declared the Defendant to be entitled to set off any balance arising from

from such transactions against the first mortgage debt : and the witness, being only a guarantee for the second mortgage, can only be affected by the amount of the claim of the first mortgagee, in the event of the property not proving sufficient to pay both, which he says he had ascertained that it was. The solution of this question must be looked for in the decisions at law, where questions upon the admissibility of evidence much more frequently occur than in this court.

1840.  
WORMALD  
v.  
MACKINTOSH.

Chief Baron *Gilbert* (a) says, the law looks upon a witness as interested, "where there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." This, as Lord Chief Justice *Tindal* observes, in *Doe dem. Lord Teynham v. Tyler* (b), may arise, first, where the witness has a direct and immediate benefit from the event of the suit itself; or, secondly, where he may avail himself of the verdict in support of his claim in a future action. The latter, which is the subject of the provisions of the late statute, does not apply to this case. The distinction between the direct and certain interest which disqualifies, and the remote and uncertain interest which does not disqualify, is strongly exemplified by the distinction stated, by Mr. Justice *Bayley*, in *Marsden v. Stansfield* (c), between the cases of inhabitants rated or only rateable, as being or not being competent witnesses to prove other land to be within the rateable district. The cases which apply most directly to the present are those in which it has been decided that legatees and creditors of a person deceased are competent witnesses, in actions by or against the representatives, to increase or protect the estate, but that a residuary legatee is not;

(a) See *Gilb. on Evid.* 106.


(c) 7 *Barn. & Cress.* 815.; see

(b) 6 *Bing.* 390.; see p. 394.

p. 818.



1840.

  
WORMALD  
v.

MACKINTOSH.

not; *Nowell v. Davies* (a), in which the other cases are referred to. The residuary legatee has a direct interest; for the fund is his, subject to the charges upon it. The legatee and creditor are interested in the amount of the fund, in so far that their claims are to be paid out of it; but they have no interest in the amount, if it be sufficient to pay such demands. Whatever may be the result of the issue upon which they are examined, such interest is not so direct and certain as to disqualify them; but they have themselves claims upon the fund, and the question is the amount of the fund. In this case, the question is the amount of the fund, and the witness has not even any direct claim upon it; but his only interest is, that he is guarantee for a sum charged upon it. If, therefore, the fund be sufficient to pay both charges, which the witness says he has ascertained it to be, he has no interest whatever; and if the statement is not to be attended to, his interest cannot be put higher than that of the legatee and creditor, in the cases to which I have referred. I am, therefore, of opinion, that the Master was right in receiving his evidence, and that the exceptions to his report for having received it must be overruled, and the order of the Master of the Rolls varied accordingly.

(a) 5 B. & Adol. 368.

1841.

The ATTORNEY-GENERAL v. The FISH-  
MONGERS' Company.

(KNESEWORTH'S Will.)

1840.  
June.

1841.  
Jan. 13.

THE facts of this case are stated in the second volume  
of Mr. *Beavan's Reports*. (a)

The Relators now appealed from the decree of the  
Master of the Rolls, dismissing the information with  
costs.

The view taken of the case by the Lord Chancellor's  
judgment, and the references made by his Lordship  
to the points raised before him, appear to render any  
report of the arguments upon the appeal unnecessary.

Mr. *Cooper* and Mr. *Anderdon*, in support of the  
appeal.

Sir *W. Follett*, Mr. *Wigram*, and Mr. *Romilly*, in sup-  
port of the decree.

The LORD CHANCELLOR.

The object of this information is to fix upon all the  
property derived by the Fishmongers' Company under  
the will of Sir *Thomas Kneseworth* the character of  
trust property, for charitable purposes, either those spe-  
cified in his will, or other purposes *cy pres*, or, at least,  
to establish and provide for the charities so specified.

The decree of  
the Master of  
the Rolls in  
*Attorney-  
General v.  
Fishmongers'  
Company*  
(*Kneseworth's  
Charity*),  
2 *Beav.* 151.,  
affirmed by  
the Lord  
Chancellor;  
his Lordship  
being of  
opinion that  
the property  
was devised  
to the Com-  
pany, for their  
benefit, sub-  
ject only to  
certain  
charges,  
which, except  
in one par-  
ticular, were  
declared il-  
legal by the  
act 1 *Ed.* 6.  
c. 14., and  
there being  
no evidence  
that, in that  
one particular,  
the charge  
had not been  
properly  
satisfied.

If

(a) Page 151. *et seq.*

1841.  
Jan. 13.

1841.

The  
ATTORNEY-  
GENERAL  
v.  
The FISH-  
MONGERS'  
Company.  
(KNESE-  
WORTH'S  
Will.)

If it shall appear that Sir *Thomas Kneseworth's* will did not devote the property so given to charitable purposes, but gave it to the Fishmongers' Company, subject to and charged with certain payments for charitable or other purposes, the first and principal object of the information fails. In considering this point, the provisions for loans to members of the Fishmongers' Company must be kept distinct from the preceding provisions; for if, as in the case of *Attorney-General v. Smythies* (a), the preceding charities have only charges upon the property, and the property, subject to such charges, be given to some ultimate charitable purpose, such preceding charities are not entitled to participate in any increase of the funds.

The testator's will gives the property to the Fishmongers' Company, to the intent that they and their successors should keep, fulfil, and perform his will and intent, and every article thereof, as after declared and specified; which is not inconsistent with an intention that they should enjoy the property, subject to such performance of such his will and intent. He then directs that the property should be kept up and repaired, so as to produce an income equal to the payments and performance of his legacies and bequests; and, after giving such legacies, and providing for the audit of the accounts, imposes a fine upon the Company for neglecting the audit, to be levied out of the issues and profits of the property. He then directs that all the surplus rents and profits, after payment of all charges above rehearsed, should be laid in a chest in the treasury of the Company, and, together with 100 marks to be paid by his executors, applied for the purposes of repairing and new building the premises, and for the purposes of the loans; and, after providing for such

loans,

(a) 2 *Russ. & Mylne*, 717.

loans, directs that in default of the Company performing the directions of his will, his said legacy or bequest to the Company of his said lands should from thenceforth be void, and all their title and interest therein should cease and determine; and he, in that case, gave the same to the City of *London*, to the intent that they should perform all the directions of his will, except the directions as to the loans, and that the Fishmongers' Company, either rich man or poor man, should have no more profit of the issues of the said lands, but by the discretion of the corporation of *London*.

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It is impossible to attend to these provisions of the will, and to entertain any doubt, but that, according to the principles of the cases of *Attorney-General v. Corporation of Bristol* (a), *Attorney-General v. Smythies* (b), and *Attorney-General v. Cordwainers' Company* (c), the gifts and directions in this will, which precede the provision as to the loans, are merely charges upon the property, and that, if they had been legal, those to whom the property is given subject to such charges would only be bound to discharge them as given, whatever might be the value of the property. I am also of opinion that the same principle applies to the provision as to loans to members of the Fishmongers' Company, although that is less definite as to the amount; and that if there had been no legal objection to that provision, all that the Company would have been bound to do would have been to furnish, out of the surplus rents, the accommodation intended. The Company were to have the benefit of the surplus of the property, subject to the observance of the testator's direction for the benefit of the poor members of it. This, though a charitable provision, was only the mode prescribed by the testator,

in

(a) 2 J. & W. 294.

(c) 3 Mylne & Keen, 534.

(b) 2 Russ. & Mylne, 717.

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in which the Company were, in part, as amongst themselves, to enjoy the gift.

So far, therefore, as this information seeks to fix upon the whole of the property derived by the Company from the will of Sir *Thomas Kneseworth*, I am of opinion that it has wholly failed. It has, however, a secondary and very subordinate object, viz. that of establishing and carrying into effect the object and directions of his will, in the several particulars which have been the subject of discussion. Much of the discussion turned upon the effect of the letters patent of 4 *Ed.* 6. and of the act 4 *Jac.* 1. The view I take of this case makes it unnecessary for me to follow that discussion further than to say that the effect of the two was, in my opinion, to give to the Company, for their own benefit, (for there is no pretence for the suggestion, that what they took from the Crown was subject to any trust,) all such interests in the property given by the will of Sir *Thomas Kneseworth*, as the Crown became, or might have become, entitled to, under the 1 *Ed.* 6. c. 14. But even that proposition is not very essential to the decision of the present case; for whether the Company so became entitled or not, it is clear that I cannot establish charities or carry into effect directions which are made illegal by the last-mentioned statute.

Of the objects attempted to be provided for by the will, two only have been supposed to be free from the operation of the statute. 1. That for the benefit of the prisoners in *Ludgate* and *Newgate* prisons: and 2d. That for providing loans for members of the Company. Of the first, nothing need be said, as there is no case established of this provision having been neglected, and as there is no ground for contending that the company were bound to increase the sum.

The

The only question is, as to the second. The gift in the will is that, of the fund to be composed of the surplus rent and of the 100 marks, 10*l.* should be lent to every honest man of the fellowship for six months, but only upon certain conditions, viz. he laying a sufficient pledge in the treasury for the sure repayment thereof, and also saying five paternosters and five aves and a creed for the testator's soul, and the souls before mentioned; and if, at the end of the six months, the party borrowing wished to have the loan continued for six months more, he was to have the same for another six months, again laying a sufficient pledge for the sure repayment of the same, at the same half year, he saying *de profundis*, or five paternosters, five aves, and a creed for the testator's soul and the souls before mentioned.

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The fifth section of 1 *Ed. 6. c. 14.* gave to the King all lands given to the founding or maintenance of any anniversary or obit, or other like thing, intent, or purpose; and, by many decisions, referred to in *Adams v. Lambert* (a), it was decided that praying for souls was a like intent and purpose as an anniversary or obit, within the meaning of the act, although not to be performed by a priest, or in any chapel; and that where the gift was for the benefit of the poor, but connected with such superstitious uses as their praying for souls, the whole went to the King. I particularly allude to the case of *Adams v. Lambert* itself, and to the cases of *Caley* and *Gregory* and *Colborn v. Dale*, there cited in pages 114 *a.* and 116 *a.* It is therefore impossible to maintain that this provision for the loans to members of the Fishmongers' Company was not within the operation of the act 1 *Ed. 6. c. 14.* The King, therefore, became entitled to the whole estate; this purpose applying to the whole of the surplus rents, if required, and there being, therefore, no distinct part or portion which could go to the King,

(a) 4 *Co. Rep.* 104. *b.*

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King; in which case it was early decided that he was entitled to the whole; the authorities for which are also to be found in *Adams v. Lambert*. The result of which is, that the Company, by means of the letters patent and the act 4 Jac. 1., obtained all the title which the act 1 Ed. 6. c. 14. would have given to the Crown; or, even if that were not so, that the gift was superstitious and void under the last-mentioned act; and that the Attorney-General, therefore, cannot call upon this Court to establish it or carry its provisions into effect.

I therefore think that the decree of the Master of the Rolls was perfectly correct, and dismiss this appeal, with costs.

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 June.  
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The ATTORNEY-GENERAL v. The FISH-  
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(PRESTON'S Will.)

The decree of  
 the Master of  
 the Rolls in  
*Attorney-  
 General v.  
 Fishmongers'  
 Company,  
 (Preston's  
 will)*, 2 *Beav.*  
 588., affirmed.

THE facts of this case are fully stated by the Lord Chancellor in his judgment. They will also be found in the second volume of Mr. *Beavan's Reports*. (a) The case came before the Lord Chancellor, upon an appeal from the decree of the Master of the Rolls, dismissing the information with costs.

Mr.

If there be  
 no doubt of  
 the origin and

(a) Page 588. *et seq.*

existence of a trust, this Court will not allow lapse of time to enable those who are mere trustees to appropriate to themselves that which is the property of others; but in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the Court will pay the utmost regard to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust.

Mr. *Cooper* and Mr. *Anderdon*, in support of the appeal.

Sir *W. Follett*, Mr. *Wigram*, and Mr. *Romilly*, for the Defendants, in support of the decree.

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*The* LORD CHANCELLOR.

The object of this information is to impeach the title of absolute ownership, which the Fishmongers' Company has enjoyed for upwards of 400 years, in various tenements in the city of *London*, and to have it declared that they have, from the commencement of that period, been, and are now, trustees of such property for charitable purposes.

The case rests altogether upon expressions used in the will of one *Henry Preston*, under which the Informant assumes that the Company derive their title to the property in question, and by which will *Henry Preston* devised the property to the Wardens and Commonalty of the Company, and their successors, to have and to hold to the said Wardens and Commonalty, and their successors, in aid of sustaining the poor men and women of the said mystery, and of the said Commonalty, for ever.


It was argued, upon the principle that this Court recognises no limitation of time in cases of trust, that no regard was to be paid, in this case, to the lapse of 400 years, which have passed away since the title of the Company appears to have accrued. Such a doctrine would be most dangerous, and might, if acted upon, prove destructive of many of the best titles in the kingdom. If there be no doubt as to the origin and

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existence



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existence of a trust, the principles of justice and the interests of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others; but in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. One of the principal reasons for admitting limitation of suits is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power. Upon this principle, this Court has, in many instances, limited the period within which it will exercise its power; and it would, indeed, be strange, if, in cases in which it has not done so, it were altogether to disregard the lapse of time, as applicable to the evidence upon which it is called upon to act.

To dispose of rights or property upon any evidence, however apparently clear, against a title and course of dealing of 400 years, would be full of danger; and no judge, not destitute of that degree of prudence and discretion which is essential to the administration of all system and law, but particularly to that of equity, would feel justified in doing so, if any reasonable suggestion could be made, reconciling the history of transactions long since passed away with the enjoyment of the property. Of this the present case furnishes a strong example. There is nothing, upon the face of the will, to shew that *Henry Preston* was not the beneficial owner of the property, or to explain the expressions to be found there, from which a charitable trust might be inferred; but if a court of equity, having nothing but that will

will before it, should have taken from the Company the beneficial interest in the property, an act of the greatest injustice would, as I believe, have been the consequence. Fortunately, I am not in that difficulty; for I have evidence before me, which, if it does not demonstrate that the Company were, from the commencement, beneficial owners of this property, raises so strong a presumption that such was the case as to relieve me from all doubt as to the duty I have to perform.

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The Fishmongers' Company, which had previously existed as a guild or fraternity, was not incorporated until the year 1493; and their charter contains a licence to hold lands of the value of 20*l.* per annum, notwithstanding the then statutes of mortmain. Before that time, the fraternity could only hold lands by procuring them to be conveyed to, and held by trustees; and, as they were within the statute 18 *Rick. 2. c. 5.*, they could not do this openly; and, after that time, they could, in their own right, only hold lands of the annual value of 20*l.*; but, by the recognised custom of the city of *London*, citizens, though they could not convey lands in mortmain, were entitled to devise them in mortmain, and the corporations were entitled to accept the lands so devised, whatever might be their value; and from this a course of proceeding was adopted, to enable the city corporations to hold more land than their charters authorised. The corporations purchasing lands procured them to be conveyed to trustees, and such trustees conveyed them to some one person, who, by his will, devised them to the corporations.

The evidence of Mr. *Hardy*, and the documents to which he refers, prove that such was the course of business in the city of *London* at the date of the transactions now under consideration; which is the whole that

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that is necessary. The answer put in issue the facts, and there is sufficient in the books to shew the probability of such having been the object and legal consequence of such facts; and no attempt was made to meet, by evidence or authority, the case so raised on behalf of the Defendants.

Assuming, therefore, as I must, that such was a usual course of proceeding, the examination of the documents in evidence, as to whether they establish the theory of the Informant, or of the Defendants, will lead to a short, and, I think, satisfactory conclusion: the theory of the Informant being that *Henry Preston* was absolutely entitled to the property, and devised it to the Company upon the charitable trusts mentioned in his will; and the theory of the Defendants being that he was only a trustee for them, and that his will was only an execution of the trust upon which he before held the property.


It is important for this, and for another purpose, to keep in mind that there is very strong evidence that the property was not, at that time, worth so much as the rent-charges upon it, or did not produce sufficient annual income to pay them. The *inquisitio post mortem* of *John Lovekin*, the charging the 40 marks upon other property as well as upon the Great Tenement, and the deed of the 20th of *April* 1446, which assumes the inadequacy of the premises to pay the charges, establish that fact sufficiently to justify its assumption in examining the history of the transaction. If, therefore, the property did belong to *Henry Preston*, his devise of it to charitable purposes was a mere mockery; but if it was then the property of the company, no such absurdity follows from his restoring it to the rightful owners.

In

In the year 1429 the property in *Gracechurch Street* and *Lombard Street* was vested in four persons, *Radwell*, *Londsop*, *Fitz Geoffrey*, and *Pijou*, and the first having died, the three last subsequently dealt with it alone. This was before the incorporation of the Company, which was not until the year 1433. If, therefore, these persons held this property in trust for the Company, the course usually at that time adopted for such a purpose would appear to have been followed. The subsequent transactions will shew whether they did so, or were beneficially entitled to the property. The Great Tenement had become vested in *Sir John Cornwall*; and, by deed, of the 11th of *November 1434*, he conveyed it to the same *Londsop*, *Fitz Geoffrey*, and *Pijou*; and on the 18th of *November 1434* they granted to him, charged upon this property and the other property which they held under the deed of 1429, an annual rent of 40 marks, with a power of entry and distress; and, in the event of non-payment, bound themselves personally to pay 5 marks as a penalty. On the same day *Londsop*, *Fitz Geoffrey*, and *Pijou* executed another deed, by which they conveyed all the property in *Gracechurch Street*, *Lombard Street*, and the Great Tenement, in fee, to *John Mitchell*, described as citizen and alderman of *London*, and ten others, of whom *Henry Preston* was one, described as citizens and fishmongers. By another deed of the 19th of *November 1434*, *Mitchell* and the ten others charged an annual rent of 40*l.* upon all the property comprised in the last deed, and upon various other properties stated to be vested in them, in favour of *Sir John Cornwall*, but with a proviso that such annual rent should not be demandable if the rent of 40 marks was regularly paid, and with a proviso against their being personally liable.

It may well be asked why, if these parties were purchasers, they should charge this and other pro-

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perty with the rent of 40l. to secure the forty marks.

By another deed of the 15th of *December*, *Mitchell* and nine of the ten, *Henry Preston* being omitted, released to *Henry Preston* and his heirs all their estates and interests in the property in *Gracechurch Street*, *Lombard Street*, and the Great Tenement; and, on the 20th of *February*, *Henry Preston* made his will, which recites the transactions as to the property in *Gracechurch Street*, *Lombard Street*, and the Great Tenement, and reciting that he had thereby become solely seised thereof in his demesne as of fee simple, devised the whole of such property to certain persons named and described as the then wardens of the Company, and to the commonalty of the same mystery and their successors for ever, in aid of the sustentation of the poor men and women of the said mystery and commonalty for ever. The will is confined to this object, and takes no notice of any other property, and is in the form in use at that time for passing trust property, as proved by *Mr. Hardy*.

If *Radwell*, *Londsop*, *Fitz Geoffrey*, and *Pijou* were trustees of the *Gracechurch Street* and *Lombard Street* property for the Company, and if the Company purchased the Great Tenement of *Sir John Cornwall*, it is very consistent with such a supposition that after the death of *Radwell* the other three should deal with the property, and that upon the purchase of the Great Tenement, the consideration for such purchase, viz. the forty marks, should be charged upon other property belonging to the Company, and that these three should convey the whole to other trustees, viz. *Mitchell* and the ten others; and if these eleven were trustees for the Company, it is proved to have been according to the usual course

course of business in such cases that the trustees should convey to one, that such one might, by will, vest the property in the Company for whom it was held in trust: but if *Henry Preston* was beneficially entitled to the property, so must have been *Mitchell* and the other ten, and so must have been *Radwell*, *Londsop*, *Fitz Geoffrey*, and *Pijou*; but, besides the improbability of so many persons acquiring and immediately parting with shares and interests in this property, and the impossibility of accounting for their dealings with the property upon that supposition, there is no appearance of any consideration being given by the eleven to the three, or by *Henry Preston* to the ten for the transfer of their interests; and the deed between the executors of *Sir John Cornwall* and the Company strongly confirms the supposition that the transaction was, from the beginning, between him and the Company.

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I observe that the Master of the Rolls seems to think it probable that *Londsop*, *Fitz Geoffrey*, and *Pijou* were trustees of the property in *Gracechurch Street* and *Lombard Street* for *Sir John Cornwall*. For the purposes of the present question, it is not material whether they were trustees for him or for the Company, though, for the reasons I have given, I think the better presumption is, that they were trustees for the latter. The Informant's proposition is, that they were the beneficial owners; the contrary of which is all but demonstrated by the evidence.

I have, therefore, no difficulty in coming to the conclusion that the Company did not derive the beneficial interest in this property from *Henry Preston's* will; whereas, before I could entertain the case made by the information, I must have been satisfied, beyond any reasonable doubt, that they did derive their title under it.

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It was then said that, although *Henry Preston* were, in fact, a trustee for the Company, yet that the terms of his will imposed upon the Company a duty of applying the property to charitable purposes. It is not easy to conceive how the expressions used by a trustee are to alter the estate and to destroy the interests of his *cestuis que trust*: but the fact that the words used are precisely those which are to be found in the licence to hold lands in mortmain, comprised in the charter of the Company, explains the ground of their introduction into *Preston's* will, and proves that there was no intention of affecting the estate and interest of the Company in this property.


There is another ground of defence, on the part of the Defendants, which remains to be observed upon. I have before stated that the property in question appears to have been of less annual value than the two rents charged upon it, which seems to have been a sufficient ground for the title of the Crown to the property itself under the stat. 1 *Ed. 6. c. 14. s. 5*. In *Adams v. Lambert* (a), it is said to have been resolved, in a case in which land of the value of 20*l.* per annum was given, 10*l.* to a priest, 5*l.* for an obit, and 5*l.* for a lamp, that all the uses being superstitious, the land itself belongs to the King; "for, inasmuch as all the profits are limited to superstitious uses, it was the intent of the act to give all the land to the King, by a reasonable construction upon the coherence and intention of all the parts of the act." That being so, as I have observed, in another case (b), it was immaterial whether the Crown actually seized the land itself or only the rents; the letters patent of 4 *Ed. 6.*, and the act 4 *Jac. 1.*, having had the effect of giving to the Company all that the act 1 *Ed. 6.* had given to the King.

This

(a) 4 *Coke Rep.* 104. b.; see  
 112. b.

(b) See the preceding case.

This probable ground of title, coupled with the 400 years' enjoyment, would, of itself, have been an answer to the claim made by the information. In this case, it is unnecessary to pursue that point further, as this additional ground is not required to support the decree of the Master of the Rolls, which I now affirm, and dismiss the appeal with costs: but I cannot part with this case without expressing my regret that this proceeding should have been instituted without that ordinary degree of consideration and research, which, if exercised, must have satisfied the relators that there was no foundation for the case attempted to be made.

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The title to property, after an enjoyment of 400 years, is questioned, and great trouble and expense necessarily occasioned to the owners, upon some expressions found in a will of the year 1434 (*a*), which even a slight attention to the history of the time, the then state of the law, and the transactions relating to the property (which the relators do not appear to have taken any pains to ascertain), would have shewn to be wholly unavailing for the purpose of supporting the claim made.

The loss which this attempt will occasion to the relators is no compensation for the injury which it has occasioned to the Defendants, from which I regret the inability of the Court to relieve them, beyond the costs of the suit, given by the decree of the Master of the Rolls, and the costs of the appeal, which I now order the relators to pay.

(*a*) 1434-5.



1840.

June 6. 8.  
Nov. 19.

## IBBETSON v. IBBETSON.

A testator bequeathed chattels to trustees, upon trust to permit them to be used by the person and persons who, for the time being, should be entitled to the possession of his mansion-house under his marriage settlement or his will, until a tenant in tail of the age of twenty-one years should be in possession of his mansion-house; and then the chattels were to belong to such tenant in tail.

The testator was, under his marriage settlement, tenant in fee, subject to some prior limitations, which all failed at his death; and, under his will, his brother became tenant for life, with remainder to his (the brother's) eldest son in tail, and died, leaving such eldest son then of the age of twenty-one years.

Held, that the gift of the chattels to the first tenant in tail who should attain twenty-one was too remote, and that the will gave the brother's eldest son no title to them.

**T**HIS case, on the hearing before the Vice-Chancellor, is very fully reported in the tenth volume of Mr. *Simons' Reports*. (a)

The Defendant, Sir Charles Henry Ibbetson, now appealed from his Honor's decree. The case was argued, at great length, before the Lord Chancellor, by Mr. *Jacob*, Mr. *Bethell*, Mr. *Kae*, and Mr. *Hodgson*, in support of the appeal; and by Mr. *Turner* and Mr. *R. Atkinson*, in support of the decree; and by Mr. *Richards* and Mr. *Loftus Wigram* for parties in the same interest as the Plaintiff.

Besides the authorities cited in the Court below, reference was made to *Vaughan v. Burslem* (b), *Randall v. Russell* (c), *Proctor v. The Bishop of Bath and Wells* (d), and Lord Bacon's *Works*. (e)

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The LORD CHANCELLOR.

N

I am of opinion that the Vice-Chancellor's judgment must be affirmed. The claim, under the gift to the first tenant in tail of the age of twenty-one who

(a) Page 495. *et seq.*(d) 2 *H. Bl.* 558.(b) 3 *Bro. C. C.* 101.

(e) Vol. iv. p. 74., ed. 1730.

(c) 3 *Mer.* 190.

who should be in possession of the testator's mansion-house, is clearly too remote. There might be successive tenancies in tail, lasting for any number of years, without any one tenant in tail in possession attaining twenty-one; and as the estate could not remain suspended, if such contingency should not happen within the period limited by the rule of law, so the possibility of such contingency not happening within the limited period renders the gift void, although the contingency has, in fact, happened within that period. The title, however, upon which the appellant principally relied was the preceding direction, that, until this contingency should happen, the property should be used and enjoyed by the persons for the time being entitled in possession to the mansion-house, by virtue of the limitations in the settlement or will.

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 v.  
 IBBETSON.

Under those limitations, the appellant's father was tenant for life in possession until his death in 1839; and he, the son, never, under this direction, had any interest in the property; because, the moment at which, by his father's death, he, for the first time, answered the description of a person entitled in possession to the mansion-house, at that moment, he being a tenant in tail in possession of the age of twenty-one, the event happened which determined the application of the rents under the former direction: nor could the case have been different if the appellant had, at the time, been a tenant in tail in possession and under twenty-one; because, although the clause in the will respecting the chattels refers to the limitation of the real estate, for the purpose of describing the person who was to have the use and enjoyment of them, and, therefore, if that had been the whole of the direction, would have given the absolute property in the chattels to the first tenant in tail of the land, yet that could not have been the result

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result of the direction in this case, for it does not refer to the limitations of the land for the purpose of adopting them as to the chattels, but introduces this important difference, that all interests prior to any tenant in tail attaining twenty-one, shall be liable to be defeated by the happening of that event; so that if the limitations are to be considered as repeated in the clause respecting the chattels, they must be so repeated with the alterations the testator has directed, and they would therefore stand thus—to be used and enjoyed by the Appellant's father for his life, and after his death by the person then entitled in possession to the mansion-house, until some tenant in tail of the age of twenty-one should be in possession thereof, and then to go and belong to such tenant in tail. Upon this point, *Trafford v. Trafford* (a) is strongly in point. The Appellant cannot claim as tenant in tail in possession of twenty-one years of age, because that limitation is too remote; nor under the intermediate gift, because that determined by there being a tenant in tail in possession of the age of twenty-one.

In *The Duke of Newcastle v. Lady Lincoln* (b) Lord *Rosslyn* observed upon the difference between contracts for settlements and wills, saying that the Court is not to do for a testator all that can be done by law, but no more than what he has intended to be done, and according to the common acceptation of the terms. That observation applied to the ordinary case of chattels being given by will to go according to the limitations of land, in which case they vest absolutely in the first tenant in tail; but it is competent for the testator to prevent such consequence, and that, in my opinion, he has done in this case. It may be said that if the gift to the

(a) 5 Atk. 347.

(b) 3 Ves. 387.; see 594.

the first tenant in tail in possession at twenty-one is too remote, so must be the direction for the application of the rents till that event should happen. If there be this objection to the direction which the testator has made in his will, it will afford no reason for introducing into the will a gift of an estate tail which he not only has not directed, but was evidently anxious to avoid. The gift to a tenant in tail in possession at twenty-one negatives any intention of benefiting any one who should not answer the whole of this description.

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It was said that the decree is, at all events, wrong, in declaring the gift void after the death of Sir *Charles Ibbetson*, the appellant's father, who was the residuary legatee. This is not an objection which this appellant can urge; and the representatives of Sir *Charles Ibbetson* have not appealed.

The appeal must be dismissed, with costs.

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PYM v. LOCKYER.

1840.  
April 25. 27.  
Nov. 25.  
1841.  
Jan. 23.  
Feb. 1.

**T**HIS was an appeal from so much of a decretal order made by the Vice-Chancellor in this cause as declared that the provisions made by the testator in the cause, on the marriages of the Defendants, *Frederick Pym*, *Edmund Lockyer Pym*, and *Eleanor Penrose Drake* (formerly *Pym*), respectively, were not ademption or satisfactions of the respective legacies of 5000*l.*, 5000*l.*, and

A grandfather having, in the opinion of the Court, placed himself *in loco parentis* to certain grandchildren, although their

father was living, and having given them certain sums by his will, and having afterwards made settlements upon their respective marriages, the presumption against double portions was held to be applicable; but, inasmuch as the advancements were smaller in amount than the sums expressed to be given by the will, such advancements were held to be satisfactions *pro tanto* only of the gifts contained in the will.

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v.

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and 6000*l.*, by the testator's will bequeathed for the respective benefits of them and their children; and against the directions given by his Honor, consequential upon this declaration.

The testator was the grandfather of these Defendants, and their marriages took place in their father's lifetime.

The provisions made upon the respective marriages were as follow: — Upon the marriage of *Frederick Pym*, to whom a legacy of 5000*l.* had been given, by the will, for life, with remainder to his children, a sum of 2000*l.* 3 per cent. Reduced stock was invested in the names of trustees, upon trust for himself and his intended wife, for their successive lives, and afterwards for their children, and, in default of children, for himself absolutely. Upon the marriage of *Edmund Lockyer Pym*, to whom a legacy of 5000*l.* had also been given, by the will, for life, with remainder to his children, the testator made a settlement of certain lands upon him and his children, and executed a bond for 3000*l.*, of which trusts were declared similar to those of the lands; and upon the marriage of *Mrs. Drake (Eleanor Penrose Pym)*, to whom a legacy of 6000*l.* had been bequeathed by the will for life, with remainder to her children, the testator, by letters, engaged to invest 4000*l.* in the public funds, upon trust, after his own death, for the intended wife and her husband, successively, with remainder to her children, and also engaged to pay, during his own life, 150*l.* per annum for the first three years, and 100*l.* per annum afterwards.

Mr. *Wigram* and Mr. *G. L. Russell*, in support of the appeal.

Mr. *Bethell*, Mr. *Loftus Lowndes*, and Mr. *Chandless*, in support of the decretal order.

Mr.

Mr. *Richards*, Mr. *West*, and Mr. *Bacon*, for other parties.

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The LORD CHANCELLOR.

This case involves the consideration of much of the doctrine upon which I acted in *Powys v. Mansfield* (a), and in so far as such doctrine shall be found applicable to the facts of this case, it must govern my decision. I have not seen any reason to doubt the accuracy of such doctrine, and shall consider it as the law of this Court, unless otherwise instructed by the authority of the House of Lords.

*Edmund Lockyer*, the testator, had two children, a son *Edmund*, the interests of whose children are vested in the Appellants, and *Eleanor Margaret*, a daughter, who had three children, *Eleanor*, *Frederick*, and *Edmund*, the Respondents.

By his will, in 1823, the testator bequeathed 5000*l.* to trustees, upon trust, subject to an annuity of 40*l.* per annum for his daughter *Eleanor Margaret*, for her life, to pay the interest for his grandson *Frederick's* maintenance till twenty-one, and then to him for life, and after his death to divide the principal equally amongst his children; that is to say, sons who should attain twenty-one or die under that age, leaving children, and daughters at twenty-one or marriage, with maintenance in the meantime; and if there should be no such children, the 5000*l.* was to fall into his residuary personal estate. Another legacy of 5000*l.* was given to trustees, upon similar trusts, for the benefit of his grandson *Edmund* and his children. Another legacy of 6000*l.* was given

(a) 3 *Mylne & Craig*, 389.

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given to trustees, upon similar trusts, for the benefit of his granddaughter *Eleanor* and her children,—her life estate to be enjoyed by her for her separate use; and the residue of his estate he gave equally between his six grandchildren, being the children of his son and of his daughter.

In 1831 the grandson *Frederick* married, and, by his marriage settlement, to which the testator was a party, but to which *Frederick's* father was not a party, after reciting the marriage agreed upon, and that the testator, as the grandfather of *Frederick*, had agreed to invest a sufficient sum to purchase 2000*l.* 3 per cent. Reduced, upon the trusts and provisions after declared, and that such sum had accordingly been purchased in the names of trustees, the trusts were declared to be for *Frederick* for life, and after his death for the intended wife for life, and then for the children, as the father and mother or the survivor should appoint, or, in default of appointment, equally, and in default of children, for *Frederick* absolutely.

In the same year, 1831, *Edmund* married; and, the settlement upon his marriage, to which, as in the former instance, the grandfather was, but the father was not a party, recited that, upon the treaty for the marriage, the testator, the grandfather, had agreed, on the part of his grandson, to convey certain premises for the purposes after mentioned, and to execute a bond for securing 3000*l.* to trustees, payable six months after his death, which sum was to be held by them upon the trusts of the settlement; and by the settlement the lands and premises were settled to the use of *Edmund*, the husband, for life, remainder to the wife for life, remainder to the children as they or the survivor should appoint, and in default of appointment to the children equally,

equally, and upon failure of children to *Edmund* in fee; and similar trusts were declared of the 3000*l.*, which became due six months after the testator's death.

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In the same year, 1831, the daughter, *Eleanor*, married; and the Master's report states a long correspondence between the testator, the grandfather, and the father of the intended husband, by which he, the testator, bound himself to lay out, in the names of trustees, 4000*l.* in the public funds, the interest of which was to be paid to himself for life, and after his death to the husband and wife and the survivor for life, and then to their issue equally, and if there should be no children, the principal to be subject to the wife's appointment; and he further agreed to pay to them 150*l.* per annum for the first three years, and 100*l.* afterwards during his own life. Nothing further was done during the life of the testator, except that he paid the 150*l.* per annum; and he died in 1836.

In answer to an inquiry as to the manner in which the grandfather had acted towards these grandchildren, the Master found, from the statement of their father, that the three children had been maintained by him, the father; except that, as to *Frederick*, the grandfather, being desirous that he should go into the church, had agreed to pay his college expenses, and had paid the tailor's bill, and part, but not all, of his personal expenses; and that, from the time of his ordination to that of his marriage, he paid him 200*l.* per annum, and, after his marriage, 100*l.* per annum: That as to *Edmund*, being desirous that he should be of the profession of the law, he paid the stamp on his articles, and the premium to the solicitor to whom he was articulated, and some small sums as pocket money; and, after he had served his time, paid the costs of his admission as an attorney, and

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his fee to a conveyancer, and made him an allowance for his lodging and maintenance in *London*, but which was very inadequate for those purposes: That, as to the granddaughter *Eleanor*, the testator did not defray any of the expenses of her maintenance or education up to the time of her marriage: That he was in the habit of constant intercourse with all the grandchildren, making them presents of money and other gratuities, and directing and controlling them with an authority equal to that of their father: that he was referred to on the treaties of the respective marriages of the grandchildren, as a person whose consent was indispensably necessary, and as the principal party to the pecuniary arrangements; but that all such children lived, at the same time, in intimate and affectionate intercourse with their parents, and that the father was never, until their marriage, wholly exempt from the costs of their maintenance and support; and that, upon the marriage of *Eleanor*, he agreed to make her an allowance of 50*l.* per annum for three years, which he paid.

Upon this state of circumstances, which was found by the Master's report, the Vice-Chancellor, upon further directions, declared that the provisions made by the testator upon the marriages of *Frederick*, *Edmund*, and *Eleanor* were not adempments or satisfactions of their respective legacies of 5000*l.* and 6000*l.* by the will bequeathed for the benefit of them and their respective children. By the appeal, the propriety of that decision is challenged.

All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable, when the object appears to be to make a provision, and

and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision, therefore, is presumed to be intended as a substitution for, and not as an addition to, that first given; but, when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts.

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The first question to be asked is, whether the sums given are to be considered as portions, or as mere gifts; and, upon this subject, certain rules have been laid down, all intended to ascertain and to work out the intention of the giver. In the case of a parent, a legacy to a child is presumed to be intended to be a portion; because providing for the child is a duty which the relative situation of the parties imposes upon the parent; but that duty, which is imposed upon a parent, may be assumed by another, who, for any reason, thinks proper to place himself, in that respect, in the place of a parent; and, when that is so, the same presumption arises against his intending a first gift to take effect as well as a second; because both, in such cases, are considered to be portions. Whether the donor had, for this purpose, assumed the office of a parent, so as to invest his gift with the character of a portion, may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken: the question being, merely, whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child, and not merely to bestow

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a gift. Upon this point, *Powys v. Mansfield*, founded upon *Carver v. Bowles* (a), and many other cases, is conclusive. Such evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extrinsic circumstances; and, as part of such extrinsic circumstances, the general conduct of the donor towards the family, and particularly towards the other children of it, may, very properly, be included in the consideration of his object and intentions.

It may be assumed that the father of the three children had but slender, if any, means of making a permanent provision for them, as, in two of the three marriages in question, he supplied nothing, and in the third only agreed to pay 50*l.* per annum for three years; and the Master's report states, upon the authority of the father himself, that the grandfather directed and controlled the children with an authority equal to his own, and that he was referred to, on the treaties for the marriages, as a person whose consent was indispensably necessary, and as the principal party to the pecuniary arrangements. Such being the position in which the grandfather had placed himself, with respect to these grandchildren, we find him, by his will, making provisions for them, and for the children of his son; not giving them certain legacies of which they or others for them might hereafter regulate the disposal, but taking upon himself to do so, and, in anticipation of their marriage, settling the sums given so as best to provide for them and for their children. Upon the marriage of *Frederick*, the grandfather appears as the only contracting party, on his side, as to provision to be made; and the settlement recites that he, as grandfather, had agreed to invest the sum advanced.

(a) 2 *Russ. & Mylne*, 301.

vanced. Upon the marriage of *Edmund*, the same course was followed, although the same words were not used; but, instead of investing a sum in the names of trustees, as was done upon the marriage of *Frederick*, he entered into a bond to pay the sum agreed to be settled six months after his death. Upon the marriage of *Eleanor*, he first proposed to bind himself to leave by his will the sum agreed to be settled; but, it being suggested that by investing it in the names of trustees the legacy duty would be saved to the family, he agreed to invest it within a certain time, but which he omitted to do.

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In all these arrangements, the sums given were settled, or agreed to be settled, as nearly as possible, in the same way as he had provided by his will, which, in *Trimmer v. Bayne (a)*, Lord *Eldon* seems to think would be of itself sufficient to establish the ademption. That the sums so settled or agreed to be settled were portions, in every sense of the word, cannot be doubted; and it is equally clear that the corresponding provisions by the will, though differing in amount, are of the same character. From the necessities of the family, or from his own free choice, or, probably, from both, he assumed the task of furnishing portions for the children, regarding, in the distribution of his property, the number of those who, standing in the same degree of relationship, had similar claims upon him. This task, so undertaken, he, in the first instance, proposes to carry into effect by his will, but, upon the marriages of the several children, he comes forward, in some instances to perform, and in others to bind himself to perform, in part, what he had so assumed the office of doing. In what respect, for the purpose of trying the intention of the donor, does this differ from the case of a parent? The father, as well as the

(a) 7 Ves. 408., see 516.

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the grandfather, were at liberty to make what distribution they thought proper of their property; but having once made the distribution, by attributing a certain sum to each child, where is the probability that, upon the marriage of that child, there should arise an intention of disturbing the whole scheme of such distribution, and of giving to such child the sum then settled, in addition to what had been before assigned as its portion, to the necessary prejudice of all the other children? It is to avoid such consequences, so little likely to be intended by the donor, that the presumption against double portions arises, which, though it may, in some instances, defeat the intention of the donor, is, in my opinion, calculated, in general, to effect it.

I am of opinion that the grandfather had, as to the pecuniary provision for the children of this family, put himself in *loca parentis*, and that the instruments themselves prove that the legacies and the sums settled were intended as portions, and, therefore, that the presumption against double portions arises, and that the several settlements or agreements upon the marriage of the grandchildren operated as adoptions of the legacies. Lord Eldon, in *Ex parte Pry* (a), seems to allude to the possibility that such second portion might be treated as an adoption *pro tanto* only. Such a limited application of the rule would, I think, in most cases, carry the intention of the testator more completely into effect. I am not aware of any case in which it has been acted upon; but as that point has not been argued, I shall be very willing to hear counsel upon it, if they think it can be maintained.

With respect to two of the portions, the testator, at the time of his death, was only under an obligation to pay

(a) 18 Ves. 140., see p. 151.

pay them; and if the will had been made after the obligation had been incurred, the legacy would have been a satisfaction of the obligation. It would be strange if, the will being of the earlier date, the obligation had not been an ademption.

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The order of the Vice-Chancellor must, therefore, be reversed, so far as it is inconsistent with this view of the case, and altered accordingly.

In consequence of the suggestion thrown out by the Lord Chancellor at the conclusion of the judgment above reported, an argument took place upon the question, whether the ademption was to be considered an ademption *in toto*, or *pro tanto* only.

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Mr. Bethell, Mr. Loftus Lowndes, and Mr. Chandless, for Frederick Pym and the children of Edmund Pym.

The ademption was *pro tanto* only. That this is the rule of law is established, impliedly by some authorities, and directly by others. It is said, in the report of the case of *Izard v. Hurst* (a), to have been agreed to be the rule of the Court, that a gift to a legatee, upon marriage or otherwise, of "the like or a greater sum" should be intended in satisfaction of the legacy, unless otherwise declared by the testator. So in *Farnham v. Phillips* (b), Lord Hardwicke says, that where a father, after making his will, advances his child with a portion "as great or greater" than the legacy given by the will, such provision has always been held an ademption; and in *Roome v. Roome* (c) the Master of the Rolls states the question raised to have been, whether

(a) *Freem.* 224.

(b) 2 *Atk.* 215.

(c) 3 *Atk.* 181.

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whether a payment of 126*l.*, by a testator, on behalf of a person to whom he had before by his will bequeathed 1000*l.*, was "a partial ademption, and ought to be taken out of the portion." And in *Powel v. Cleaver* (a), Lord *Thurlow* states the question there to be, whether an advancement of 5000*l.* to a legatee to whom 6000*l.* had been given by the will was "an ademption, *in toto*, or in part, of the legacy;" though, in that case, his Lordship held, that no ademption at all had taken place, as the testator did not stand *in loco parentis* to the legatee. The case of *Robinson v. Whitley* (b), also, although one in which it was decided that no ademption had taken place, shews that, if, in that case, the smaller gift had been considered a satisfaction at all, it would have been held to be a satisfaction *pro tanto* only.

In *Clerk v. Lucy* (c) the question was distinctly raised whether a settlement, by a father, upon his daughter's marriage, of part of certain lands, which he had before devised to her by his will, was a revocation of the whole devise to her, or only a revocation *pro tanto*; and Lord *Cowper* expressly decided that it was "a revocation only *pro tanto* of the lands devised to her, and not of the whole devise." So, in *Norton v. Norton*, in *Michaelmas* term 1692 (d), it was held, by the Lords Commissioners *Rawlinson* and *Hutchins*, that a father's buying for his son an office or a commission in the army, are "advancements *pro tanto*." In *Hoskins v. Hoskins* (e), also, it was held that a father's purchase of a cornetcy for 650*l.* was an ademption, *pro tanto*, of a legacy of 750*l.*; but it must be admitted, that there was some evidence of an intention to alter his will, by deducting the purchase money from the legacy, and therefore the

case

(a) 2 Bro. C. C. 499. See  
p. 517.

(b) 9 Ves. 577.

(c) 8 Vin. Abr. 154.

(d) 3 P. W. 517, note.

(e) Pre. Cha. 263.

case is, perhaps, not strictly an authority. The case of *Thellusson v. Woodford* (a), before Sir J. Leach, was decided upon evidence of the testator's intention; but Sir J. Leach's observations upon what the case would have been independently of the evidence shew that he considered that a subsequent advancement of smaller amount would be deemed an ademption *pro tanto* only. So in *Monck v. Monck* (b), where a legacy of 5000*l.* had been given, and 4000*l.* was afterwards settled, 1000*l.* having been paid for the legatee in another manner, it is clear that Lord *Manners* considered that if the 1000*l.* had not been paid, the settlement of the 4000*l.* would have been a satisfaction, *pro tanto* only, of the legacy of 5000*l.*

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In no case has it really been held that a smaller subsequent gift has adeemed a previous legacy *in toto*.

The case of *Clarke v. Burgoine* (c) will be relied on by the other side; but that case is misreported; for a reference to the Registrar's Book shews that, instead of two legacies of 3500*l.* each, which the report would represent to have been adeemed by the payment of 2000*l.*, and a covenant to pay 4000*l.*, there was, in fact, only one legacy of 3500*l.*; and the decree declared that the gift of the 4000*l.* was a satisfaction of the legacy of 3500*l.* From the report of *Hartop v. Whitmore* (d), contained in *Peere Williams*, it would be inferred, that it was held that a daughter's legacy of 500*l.*, under her father's will, was totally adeemed by a subsequent gift of 200*l.*; but that report is inaccurate, as appears from Mr. *Cox's* note, from which we learn that the legacy was a legacy of 300*l.*, to the daughter, in case she married

(a) 4 *Madd.* 420.

(b) 2 *Ba. & Be.* 298.

(c) 1 *Dick.* 353.

(d) 1 *P. W.* 681.



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married with her mother's consent, and of 200*L.* only, if she married without such consent; and that she did marry, without the mother's consent, in the father's lifetime: and this state of the case is that which is represented in the fuller report, which is to be found in *Precedents in Chancery* (a), in which it is expressly stated, as one of the grounds of the decision, that the larger legacy, viz., that of 300*L.*, never became due at all.

It will, perhaps, be said, that *Trimmer v. Bayne* (b) countenances the notion of the total ademption: but in that case Lord Eldon was of opinion that the testator distinctly intended that the amount settled should be an ademption *in toto*; and a careful examination of the judgment will shew, that an inference in favour of total ademption by a smaller provision is not warranted by the expressions which it contains. Lord Eldon suggests, that "where a parent or person *in loco parentis* gives a legacy, as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this Court will presume he meant to satisfy the one by the other." "Advances" what? No substantive follows the word "advances," and some word must be understood to make the sense complete: but what ground is there for supplying words indicating a portion of any amount?" Again, he says that "the Court overlooks small differences in the circumstances of that which is proposed to be given and that in satisfaction of which it is contended to be given;" but he does not say that the Court overlooks differences in amount, so as to make a smaller amount a satisfaction, *in toto*, of a larger.

In

(a) *Pre. Cha.* 541.(b) 7 *Ves.* 508.

In *Ex parte Pye* (a) Lord Eldon says, that the Court has, in some cases, gone the length of holding that the portion, though much less than the legacy, was a satisfaction of the legacy, upon the ground that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it. Lord Eldon says, that this length is consistent with the principle; but he condemns the principle, and says that the length to which it has been carried shews the fallacy of the reason upon which it is to be founded. He was, however, mistaken in stating that the Court had gone that length; for he had probably been misled by the erroneous reports of *Clarke v. Burgoine* and *Hartop v. Whitmore*.

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An argument in favour of the ademption or satisfaction being considered as *pro tanto* only, may be deduced from the Statute of Distributions, 22 & 23 Car. 2. c. 10., which provides merely that the amount advanced shall be brought into hotchpot, and not that the amount of what the father may have advanced in his lifetime is necessarily to be taken as establishing, conclusively, against the child, the extent of the father's obligation towards that child.

If, as it is conceived has been shewn, the law of the Court does not require that the subsequent advancement should be deemed to be a satisfaction *in toto*, the circumstances of this case afford as little reason for such a conclusion; for there is nothing whatever in the circumstances of the case to shew that the testator ever altered the intentions of equality which he had evinced in the provisions which he made by his will.

Reference

(a) 18 Ves. 140. See p. 151.

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Reference was also made to *Bellasis v. Uthwatt*. (a)

Mr. *Richards* appeared for Mrs. *Drake* (formerly *Pym*), a party in the same interest; and he referred to *Grave v. Lord Salisbury* (b), and Lord *Eldon*'s observations on that case in *Ex parte Pye*.

Mr. *Wigram* and Mr. *G. L. Russell*, for the unadvanced grandchildren.

A mere casual gift by the testator to the legatee is not an ademption or satisfaction; but if the gift is intended as a portion, then it is a satisfaction, and a satisfaction, *in toto*, of what has been given by the will. The question always is, whether the subsequent gift is intended as a portion. Unless it is, the presumption of law does not arise; but if it is, then the presumption applies, and that presumption is, that the testator did not intend to give two portions, and that what he has given in his lifetime is to be a satisfaction for that which, when he made his will, he intended to give at his death. The general impression of the profession has long been in favour of the total ademption or satisfaction, in such a case.

Lord *Hardwicke* says, in *Shudal v. Jekyll* (c), that "whether the portion given in the lifetime is less or not, is no ways material;" and it is perfectly clear, from what Lord *Eldon* says in *Ex parte Pye*, that he so understood the rule; and his expression of disapprobation of the principle upon which the rule was founded only shews that he thought the rule conclusively established.

In *Rosewell v. Bennet* (d), a legacy of 300*l.* to put a son out as an apprentice was held, by Lord *Hardwicke*,

to

(a) 1 *Atk.* 426. note.(b) 1 *B. C. C.* 425.(c) 2 *Atk.* 516.(d) 3 *Atk.* 77.

to be totally adeemed by the father's laying out 200*l.*, in putting him as clerk to a person in the Navy Office.

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*Clerk v. Lucy*, cited on the other side, was the case of a devise of land; and the Court went into the consideration of the evidence in the cause, which could not have been done, unless the presumption of satisfaction had been first raised. *Hoskins v. Hoskins*, *Thellusson v. Woodford*, and *Monck v. Monck*, were all decided upon the evidence. *Bellasis v. Uthwatt* is merely a reporter's note.

The facts of this case, independently of the rule of law, give no countenance to the argument on the other side.

Mr. *Bethell*, in reply.

When Lord *Hardwicke*, in *Shudal v. Jekyll*, says, that whether the portion given in the lifetime is less or not, is noways material, he means merely that it is not material to the rule against double portions, not that it is not material upon the question whether a smaller portion is to be considered a total satisfaction of a larger.

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The LORD CHANCELLOR.

Feb. 1.

When, upon the first argument of this case, I had come to the conclusion that the testator had placed himself *in loco parentis*, and that the effect of the portions upon the provisions by the will was, therefore, to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision, if the rule generally received in the profession, and laid down in all the text-books of authority, and, apparently

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apparently founded upon the highest authority, was to regulate the division of the property; the rule to which I refer being, that a portion "advanced by a father to a child will be a complete ademption of a legacy, though less than the testamentary portion." (a) I could not but feel that, in the case before me, and in every other, the effect of the rule would be to defeat the intention of the parent. A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced.

So far the rule is founded on good sense, and adapted to the ordinary transactions of mankind. The supplying the wants of one child for an advancement is not permitted to lessen or destroy the provisions made for the others, by giving both provisions to the child advanced; but the supposed rule that the larger legacy is to be adeemed by the smaller provision, appears to me not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive of the obvious intention of the parent. Can it be assumed, as a proposition so general as to be the foundation

(a) 1 *Bayer Leg.* 518.

foundation of a rule of property, in the absence of any expressed intention, that the marriage of one child and the advancing a portion to such child, furnishes ground for the father's altering the mode of distributing his property amongst his children, by taking from the portion previously destined for that child, and, to the same extent, adding to the provision for the others? Is it not, on the contrary, the usual course and practice that the father, upon a child's marriage, parts with the control over as little as possible, preferring to reserve to himself the power of disposing of the residue of the portion destined for such child, as its future circumstances and situation may require? In doing so, the father is not influenced only by the natural preference of bounty to obligation, but adopts a course which he may well be supposed to think most beneficial for his children. Where, then, is the ground of the presumption, that he intended, by advancing part of what he had destined as the portion of that child, to deprive that child of the remainder?

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The argument in favour of the proposition appears to me to be founded upon technical reasoning as to the term "portion," without due consideration of the sense in which that term is used. The giving a portion to a child is said to be a moral debt, but of the amount of which the parent is the only judge; and although the parent has, by his will, adjudged the amount of that moral debt to be a certain sum, he is supposed, by the settlement, to have departed from that judgment, and to have substituted the amount settled; and this only because the one provision and the other are considered as a portion. This, however, assumes the portion settled to be intended as a substitution of the portion given by the will; and such intention, if proved, would remove all doubt; but the question is, whether such intention

is

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is to be presumed, in the absence of all proof. Is it not more reasonable to suppose that the intention as to the amount of the portion remains the same, and that the sum settled is only an advance of part of what the will declares to have been the intended amount of the whole? There is no reason for supposing the sum advanced to be the whole portion intended for the child; and if so, there can be no reason for assuming it to be substituted for the whole. The effect of a portion advanced by a parent upon a legacy before given is called an *ademption*; but if the principle of *ademption* be applied to this case, the consequence now under consideration will not follow. The gift or alienation of part of what constitutes a specific legacy will not destroy the legacy as to what remains. So, the admitted exceptions to this general rule do not seem very consistent with the existence of that part of it now under consideration. The rule is said not to apply, when the testamentary portion and the subsequent advancement are not *ejusdem generis*. This may be very reasonable, as indicative of intention, but it is not easy to discover why, if one thousand pounds advanced is to be an *ademption* of a ten thousand pounds legacy, a gift of stock in trade of the value of 1500*l.* is not to be an *ademption* of a legacy of 500*l.*, which, in *Holmes v. Holmes* (a), it was held not to be. So, a testamentary gift of a residue, or part of a residue, is said not to be *adeemed* by a subsequent advancement, because the amount is uncertain; but, in that case, the child, if sole residuary legatee, takes, as advancement, part of what it would, if no such advancement had been made, have taken as residue. The gift under the will operates, though diminished by the amount of the advancement. The statute of distributions, the customs of *London* and

*York*

(a) 1 *Bro. C. C.* 555.

*York* and the whole doctrine of hotchpot, proceed upon the principle that advancement by a parent does not operate as substitution for, but as part satisfaction of, what the child would otherwise be entitled to; the object being to produce equality, and not, according to the rule contended for, inequality, between the children.

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It appears to me, therefore, that all reasoning and all analogy are against the supposed rule. It remains to be examined, whether the authorities are such as to make it my duty to act upon it; and I cannot but express the satisfaction I have felt at having had the cases so thoroughly examined. I think the profession and the public are much indebted to those whose industry and ability have brought the real state of this question so satisfactorily before me.

*Hoskins v. Hoskins* (a), decided in the year 1706, is a case in which a smaller sum advanced was held to be an ademption, *pro tanto*, of a larger legacy; but it does not appear whether the decision proceeded upon the evidence of intention.

*Hartop v. Whitmore* (b), determined in 1720, is a very important case, being one generally referred to in support of the supposed rule, which, if the report in *Peere Williams* had been correct, it never could have been. As there reported, it is a case of a legacy of 500*l.*, adeemed by an advancement of 300*l.*; but, it appears from Mr. Cox's note to *Peere Williams*, the report in *Precedents in Chancery*, and the Registrar's Book, that the whole statement of the facts in *Peere Williams* is erroneous. There was a legacy of 300*l.* in one event, and of 200*l.* in another, and an advancement of 200*l.*;

and

(a) *Pr. Ch.* 263.  
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(b) *Pr. Ch.* 541., and 1 *P. W.* 681.  
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and it was held that the 300*l.* never became payable, in the events which happened, and that the 200*l.* was adeemed or satisfied by the 200*l.* advanced.

*Norton v. Norton*, in a note to *Pusey v. Desbouvrie* (a), was cited; but that case appears to refer to advancements under the custom of *London*.

The case of *Clerk v. Lucy*, in the year 1716 (b), only proves that this supposed rule was never supposed to apply to devises of real estate; but the case is principally valuable as shewing, though only from the argument of counsel, that the supposed rule does not appear to have been heard of in 1716. The counsel are reported to have said: "Suppose a father by his will gives his daughter 10,000*l.*, and afterwards marries her, and gives her 5000*l.* for her portion, and then dies, without revoking his will, this is clearly not a revocation of the whole devise of 10,000*l.*, but only a revocation or satisfaction *pro tanto*, viz. 5000*l.*, and she shall take the other 5000*l.* by the will. This is a plain case, and the same in reason as the present."

In *Farnham v. Phillips*, 24th of October 1741 (c), the decision turned upon the legacy being a residue; but Lord *Hardwicke* is reported to have thus expressed himself: "Where a father, after making his will, advances his child with a portion *as great or greater* than the legacy given by the will, such provision has always been held an ademption."

Dicta of judges upon matters not argued or directly before them, have had more importance attached to them

(a) 5 *P. W.* 316.(b) 8 *Vin. Ab.* 154.(c) 2 *Atk.* 215.

them than; in my opinion, they ought to have had; but such expressions, falling from such a man as Lord *Hardwicke*, may safely be relied upon to shew that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord *Hardwicke* in mind, because another *dictum* of that very eminent judge, in *Shudal v. Jekyll*, 25th of February 1742 (a), is relied upon in support of the supposed rule. The case itself has no application to the point now under consideration, the decision having turned upon this, that the testator did not stand *in loco parentis*; but Lord *Hardwicke* is reported to have said: "This Court, to be sure, leans strongly against double portions, or double provisions; and whether the portion given in the lifetime is less, or not, is no ways material." Lord *Hardwicke* may have meant that, so far as the portions are double, *i. e.* the one a repetition of the other, one only shall prevail; and that it is not material whether such repetition be as to part or as to the whole of the legacy, which would make this *dictum* consistent with the former; but, assuming that the obvious meaning of the words is to recognise the supposed rule, the effect will be removed by the fact of the erroneous report of *Hartop v. Whitmore* (b) having been cited; and, the point not being the subject of argument or decision, Lord *Hardwicke* may, naturally, at the moment, have assumed that report to be a correct exposition of the law. A *dictum* under such circumstances could have no weight against a contrary opinion expressed only a few months before.

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The case of *Rosewell v. Bennet*, in the year 1744 (c), is a decision only as to the admissibility of evidence; and

(a) 2 Atk. 518. See p. 518.

(c) 3 Atk. 77.

(b) 1 P. W. 681.

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and Lord *Hardwicke's* observations shew that he considered the 300*l.* legacy and the 200*l.* advanced as intended for the same purpose; which places this case in that class which have decided that, even when the testator is a stranger, the advance of money to effect the purpose for which the legacy was given operates as an ademption; and in Mr. *Roper's* book on *Legacies* (a) the case of *Rosewell v. Bennet* is cited in support of that proposition. It is also to be observed that if the 200*l.* advanced had, *per se*, raised the presumption of an intention to revoke the 300*l.* legacy, the evidence tendered would have been useless to fortify the presumption, as there does not appear to have been any evidence offered to repel it.

*Clarke v. Burgoine* (b) is another case generally cited in support of the supposed rule, and, as reported in *Dickens*, it would be a strong authority for that purpose; for it is there represented that Lord *Camden* decided that a settlement of 6000*l.* was an ademption of two legacies of 3500*l.* each; but, upon reference to the Registrar's Book, it appears that, instead of there having been two legacies of 3500*l.* each, there were three legacies, one of 2000*l.*, one of 500*l.*, and one of 1000*l.*, making together only 3500*l.*; so that this case does not bear upon the question.

It thus appears that the only two cases in which it appeared that a smaller advancement had been held to be an ademption of a larger legacy, that is, *Hartop v. Whitmore* and *Clarke v. Burgoine*, are inaccurately reported, and that in neither of them did the facts exist to raise any such question.

In

(a) Vol. I. p. 329.

(b) 1 *Dick.* 353.; anno 1767.

In *Grave v. Lord Salisbury*, in 1784 (a), the point decided was different; but the Attorney-General, in arguing for the ademption, only contended that, in provisions by a father for a child, the general principle was, that every sum of money advanced was a satisfaction for so much of the legacy.

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The case of *Powel v. Cleaver*, in the year 1789 (b), was not decided upon any point applicable to the present case; but the doctrine now in question was much discussed, and Lord *Thurlow*, in one part of his observations, supposes a possible case of a legacy of 6000*l.* being adeemed by an advancement of 5000*l.*, but upon the untenable ground that 5000*l.* *in presenti* was equal to 6000*l.* under the will of a living man, assuming, therefore, that the advancement must be of equal value with the legacy; but this the supposed rule, if it existed, would repudiate, as it is not conceived to regard the relative values of the legacy and the advancement, provided both be in the nature of portions.

In *Robinson v. Whitley*, in 1804 (c), the legacy was 1000*l.*, and the sum advanced 500*l.* Sir *William Grant* thought the presumption was altogether rebutted by the evidence; but the counsel, who argued in support of the ademption, only contended "that an advancement by a father to a child was considered, *primâ facie*, as an advancement, *pro tanto*, of what was given by the will."

In *Monck v. Monck*, in 1810 (d), the legacy was 5000*l.*, and the sum advanced upon the marriage of the legatee was 4000*l.*, and Lord *Manners* says the 4000*l.* is certainly

(a) 1 *Bro. C. C.* 425.

(b) 2 *Bro. C. C.* 499.

(c) 9 *Ves.* 577.

(d) 1 *Ball & B.* 298. See p. 304.

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tainly a satisfaction *pro tanto* of the 5000*l.*; but he dismissed the bill, because it was proved that another sum of 1000*l.* had been previously paid by the testator to the legatee, in part of the 5000*l.*

There appear to be two cases in which this question came under the consideration of Lord *Eldon*, *Trimmer v. Bayne*, in 1802 (a), and *Ex parte Pye*, in 1811 (b); but in neither was there any decision upon it. In the former, the legacy and the provision were equal: in the latter, the legacy was 4000*l.* and the advancement 3000*l.* All that was contended for was, that the 3000*l.* was to be considered as an advancement, and in *part* satisfaction of the legacy of 4000*l.* Lord *Eldon* decided that the advancement was not a satisfaction of the legacy, but upon grounds which have no application to the present question. The case, therefore, is important only from the observations which fell from Lord *Eldon*, and it is not easy to determine on which side they preponderate. He says that, from his recollection of the case of *Grave v. Lord Salisbury*, Lord *Thurlow* stated that if a portion be given to a child by a will, and, afterwards, an advancement is made on marriage, that is, *prima facie*, an ademption of the whole, or *pro tanto*; and he afterwards says that it is the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, and afterwards advances a portion on marriage of that child, though of less amount, it is a satisfaction of the whole, or in part: the meaning of which, as I understand it, is, that if the advancement be equal to the legacy, it is a total ademption, and if less, *pro tanto* only; and he immediately proceeds to state that some cases have gone the length of holding that a portion, though much less than the legacy, has been held a satisfaction of the whole.

As

(a) 7 *Ves.* 508.

(b) 18 *Ves.* 140.

As the only cases in which this appears to have been decided are *Hartop v. Whitmore* and *Clarke v. Burgoine*, Lord *Eldon* must be assumed to have referred to them, or to be speaking from general recollection of what appears to have been decided by them, and if so, the expressions used are accounted for; but all the importance which would otherwise belong to any thing falling from Lord *Eldon*, is removed, by its being ascertained that both those cases are erroneously reported, and that neither of them has any reference to the doctrine they have long been supposed to establish.

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The result of a careful examination of the authorities is, that there is not sufficient authority to support the supposed rule, but that, on the contrary, the weight of authority is decidedly against it; and as it cannot be supported upon principle, and is, in its operation, generally destructive of the interests which parents have intended for their children, I think it my duty, notwithstanding the manner in which it has been received in the profession, to decline adopting or following it, and, therefore, to declare that the advancements, upon the respective marriages in this case, are to be taken as ademp-tions, *pro tanto* only, of the legacies before given.

1839.

Nov. 22, 23.

1840.

Nov. 5.

## EASUM v. APPLEFORD.

A testator directed that in case of one of his daughters having no child, his trustees should stand possessed of a sum of 3000*l.* and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned, during the daughter's minority,

THE facts of this case are stated in the tenth volume of *Mr. Simons' Reports. (a)*

The Defendants *Joseph Appleford* and his children now appealed from the Vice-Chancellor's decree, except so far as it provided for the costs of the suit.

*Mr. Wigram* and *Mr. Sheffield*, in support of the appeal.

*Mr. Jacob*, *Mr. Stuart*, and *Mr. Craig*, in support of the decree.

*Mr. Richards* and *Mr. Coleridge*, *Mr. Piggott* and *Mr. Thomas Parker jun.*, for other parties.

In

(a) P. 274. *et seq.*

upon such trusts as the daughter should by will appoint, and in default of appointment, or in case of appointment, as to such parts of the 3000*l.* as should not be effectually comprised therein, or whereof the trusts to be thereby limited should either never take effect, or should determine, upon the trusts by his will declared of his own residuary estate.

The daughter, having no child, by her will, after reciting that the 3000*l.* and the accumulated dividends had been blended with funds to which she was absolutely entitled in a sum of 6700*l.* consols, standing in the names of trustees, proceeded, in express execution of the power, to direct that the 3000*l.*, and the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to 2700*l.* consols, for her mother, and, as to 250*l.* consols, for another person, and, as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, and all my monies, and securities for money, and all the residue of my estate and effects," to the same trustees, upon trust to convert and to invest in the funds such part as should not already be so invested, and to stand possessed of all such funds, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother and the other person referred to, upon certain trusts which she proceeded to declare.

The mother died in the daughter's lifetime.

Held, that the 2700*l.* consols was not well appointed, and that it was subject to the trusts declared by the testator of his residuary estate.

## CASES IN CHANCERY.

57.

In addition to the cases cited in the Court below, *Malcolm v. Taylor* (a) and *Sugden on Powers* (b), were referred to in support of the appeal.

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*The* LORD CHANCELLOR.

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The Vice-Chancellor's decree declares that a sum of 2700*l.* 3 per cents. was not appointed by the will of *Mary Ann Easum*, but constitutes part of the residue of the estate of *Matthew Easum*. This the Appellant controverts, and insists that the sum in question was well appointed by the will of *Mary Ann Easum*.

The sum in question was part of a sum of 3000*l.* which *Matthew Easum*, by his will, bequeathed to trustees, upon trust to pay the income to his daughter, *Mary Ann Easum*, for life, for her separate use, and (after provisions for her children, which failed, she never having married) upon such trusts, and for such intents and purposes, as she should, by will, appoint; and in default of any such direction or appointment, or, in case any should be made, then, as to such parts of and interest in the said sum of 3000*l.* as either should not be well and effectually comprised therein, or as should be comprised therein, but whereof the trusts and estates to be thereby limited should either never take effect or should determine, upon such and the same trusts as were thereafter declared of the residue of the trust monies, and which residue he afterwards directed his trustees to hold for certain of his children, equally, of whom *Mary Ann* was one.

*Mary Ann Easum*, by her will, after reciting the will of her father, and the power thereby given to her of appointing

(a) 2 *Russ. & Mylne*, 416.

(b) Vol. 2. p. 29.



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pointing the 8000*l.*; and her intention to exercise such power, but that the trustees had invested the 5000*l.*, and interest, and her share of the residue of her father's estate, indiscriminately, in the 3 per cents., and which constituted together a sum of 6700*l.* 3 per cents., directed and appointed that the sum of 3000*l.*, or the stocks or funds in or upon which the same was or should be invested, should go and be transferred by the trustees in whose names the same should stand at her decease, unto two other trustees named in her will, upon the trusts after declared; that is to say, upon trust thereout to assign and transfer 2700*l.* 3 per cents., or so much of any other stocks or funds constituting any part of the said trust funds as should be equal thereto, at the time of her decease, unto her mother *Ann Easum*, for her own absolute use and benefit; and also thereout, in the same way and manner, to transfer and assign 250*l.* 3 per cents., or a like amount in value of any such other stocks or funds as aforesaid, unto *Sarah Williams*, and to stand possessed of the residue of the said stock or funds, upon the trusts and to and for the intents and purposes thereafter declared and expressed of and concerning her residuary estate and effects. And as to all the residue of her stock in the public funds, and all her monies, and all the rest, residue, and remainder of her estate and effects, whether under the will of her father or otherwise, she bequeathed the same to the trustees before named, upon trust to invest the same in the public funds, and to stand possessed thereof, and also of the residue of the said trust funds which should remain after paying the several legacies of stock to her mother and *Sarah Williams*, upon certain trusts therein declared; and she appointed two persons executors, one of whom was one of the trustees to whom she had directed that the trust funds should be transferred.

The

The mother died before the testatrix *Mary Ann Easum*, whereby the appointment of the 2700*l.* 3 per cents. in her favour failed; and the question is, whether that sum thereby fell into the residue of *Matthew Easum's* estate, as not being appointed by *Mary Ann Easum*, or was well appointed by that part of her will which disposed of the residue of the said stocks or funds.

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In support of the latter proposition, the Appellant relied upon the well-known rule, that a residuary gift will, in general, carry a lapsed legacy, and that the same rule has been held to apply to gifts by way of appointment, as to legacies. *Oke v. Heath* (a) was the first case referred to; and that case is important, as containing Lord *Hardwicke's* opinion that, in these questions, the appointment being by will, the same rule must be followed as in other cases of legacies; but the facts of that case prevent its being any authority for the present. In that case, the donee of the power gave, by her will, part of the fund, absolutely, to a person who died in her lifetime, and gave all the rest and residue of what she had power to dispose of to her niece, in whose favour Lord *Hardwicke* decided; — not the fractional part of a specified fund, but all that should remain subject to her power; which, at the time of her death, was that interest which had been appointed to the deceased.

In *Falkner v. Butler* (b), the donee of the power bequeathed 700*l.* to a person who was held not to be an object of the power, and, “after payment of the above legacies,” appointed the residue of her husband’s personal estate; and this gift was held to include the 700*l.* This was a residuary gift which, in the case of a bequest, would clearly have passed a lapsed legacy.

*Malcolm*

(a) 1 Ves. sen. 135.

(b) *Ambler*, 514.

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*Malcolm v. Taylor* (a) was also cited for the Appellant. That decision turned upon a principle which cannot be applied to the present case. Both Sir *J. Leach* and Lord *Brougham* rested their decisions upon this, that the gift which had lapsed was given as a charge upon the stock, and that failing, the sum appropriated to it fell into or rather became part of the gift of stock upon which it was so charged.

Those cases of lapsed appointment being, as I conceive, inapplicable to the present, the solution of the question must be looked for in the decisions which have taken place upon questions of lapsed legacies passing by residuary gifts; and, in doing this, care must be taken to bear in mind that, though the appointment, being by will, must, as Lord *Hardwicke* says in *Oke v. Heath*, be subject to the rules which affect testamentary dispositions, the subject matter is not the property of the maker of the testamentary disposition; and, therefore, not affected by any part of the will which is intended to operate only upon that which is so. This consideration will shew, at once, how untenable is the argument urged at the bar, that the donee of the power having directed the transfer of the fund from the trustees appointed by the donor, to others named by her will, had, by so doing, made the fund part of her estate. No doubt, she might have made these funds part of her general estate, but it is clear that she never intended so to do. She, throughout, distinguishes between her own property, and that over which she had the power of appointing; and if, in the events which have happened, the 2700*l.* 3 per cents. was appointed by her will, that must have been effected, not by any words relating to her own property, but by the words in the residuary gift: "And also all the residue

(a) 2 *Russ. & Mylne*, 416.

sidue of the said trust funds which shall remain after paying and satisfying the several legacies of stock hereinbefore directed to be paid or transferred thereout, unto my said mother and the said *Sarah Williams*." The question therefore is, whether, — in the case of a will professing to dispose of a certain sum in a particular investment, and giving one sum, part of it, to one person, and another sum, other part of it, to another, and what shall remain of such sum, after paying such two legacies thereout, to a third, — that third person can take the sum first given, in consequence of a lapse by the death of the legatee. Had the whole fund been 900*L.*, and 300*L.* of it had been given to the first legatee, and 300*L.* to the second, and the 300*L.*, which will remain, after paying those two legacies thereout, to the third, no question could have been made; and wherein is the difference? The trustees having, as the testatrix states, mixed up the trust fund with other monies in one investment, she was unable to specify the amount of the trust fund, or to state, in figures, how much of it would remain to constitute the third gift; but, in substance and effect, the three gifts are as distinct as if she had done so. There is no residuary gift applicable to this fund, but only a gift of a certain part of it, the amount of which was to be ascertained by payment of the two other parts before given; and if this be the right construction of the will, the doctrine applicable to legacies will be found to support the judgment of the Vice-Chancellor.

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The general rule that a residuary clause passes a lapsed legacy—that which was intended to be the subject of bounty to another—is founded upon this,—not that it effects, in specie, what the testator intended, for he probably contemplated nothing beyond the particular legacy taking effect, but because the residuary clause is understood to be intended to embrace everything not otherwise effectually

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effectually given ; because, as Sir *W. Grant* expresses it in *Cambridge v. Rous* (a), the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee ; so that, upon failure of the particular intent, the Court gives effect to the general intent. When, therefore, from the construction of the will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed bequest is undisposed of. Such is the case of a residuary bequest to several, as tenants in common. The share of one, dying in the testator's lifetime, does not pass ; because, the testator having given to each a certain proportion of his property, according to their number, it would not be consistent with such declared intention to give to the survivor a larger proportion.

Upon this principle, Lord *Camden*, in the *Attorney-General v. Johnstone* (b), held that a residuary clause did not pass a legacy which had failed ; saying that, for that purpose, the residuary legatee must be a general legatee, to take every thing which does not pass by the will, and that if the testator circumscribes or confines the residue, the residuary legatee, instead of being a general legatee, becomes a specific legatee.

Such being the principle of the doctrine as to the effect of residuary clauses upon lapsed legacies, and such being the exception to the rule, I find nothing in that doctrine to support the Appellant's claim ; and, therefore, must affirm the Vice-Chancellor's decree, and dismiss the appeal with costs.

(a) 8 *Ves.* 12. See p. 25.(b) *Ambler*, 577. See p. 580.

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Jan. 20.

BARNARD v. PUMFRETT.

**JOHN PUMFRETT**, by his will, dated the 29th of July 1833, bequeathed as follows:—"I give and bequeath the sum of 500*l.* to each of the children of my sister *Mary*, the wife of *Philip Barnard* of *Woodbridge*, in the county of *Suffolk*, draper; each of the sons to be entitled to their respective shares on his arriving at the age of twenty-five years, and the daughter on her arriving at the age of twenty-one years, or on the day of marriage, providing it is with the consent of her parents or guardians; and to be paid to them by my executor hereinafter named immediately on such child attaining the said age or day of marriage respectively." The testator, then, after giving an annuity of 20*l.* to his sister *Mary Barnard* for her life, and an annuity of 20*l.* to his sister *Ann Edis* for her life, bequeathed all his personal estate, subject to the payment of his debts, funeral and testamentary expenses, annuities and legacies, to his only son, *George Betts Pumfrett*; and also devised to him and his heirs all his real estate, and appointed him his sole executor.

Decree, for payment of legacies, made against an executor, without reference to the state of the assets, upon the ground of his having, by his acts and admissions, rendered himself personally liable for the payment.

The testator died on the 23d of May 1836. He had, for some years before, but not up to the time of his death, been engaged in partnership with his son *G. B. Pumfrett* in the trade of a brewer: and, from the time of the determination of the partnership, down to and after the testator's death, the son carried on the same business.

The testator's sister *Mary Barnard*, who died before the filing of the bill, had five children, *Philip Lucas Barnard*, *John Barnard*, *Samuel Barnard*, *Mary*, the wife of *John Skeet*, and *James Barnard*.

On

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On the 29th of *May* 1836, *G. B. Pumfrett* wrote to *Philip Lucas Barnard*, a letter, in which, after alluding to the death of the testator, he proceeded as follows:—

“By his last will and testament I perceive you are entitled to a legacy of 500*l.* to be paid to you on your attaining the age of twenty-five years; the same legacy of 500*l.* to each of your brothers on attaining the same age, and a similar sum to your sister on her arriving at twenty-one. The above legacies I assure you, my dear *Philip*, shall be most cheerfully paid to you all, in just compliance with your late dear uncle’s bequests.” \* \* \*  
 “I shall, as soon as the legal time arrives for payment, give you a line, so that you may please yourself in what way you would like best to receive it.”

On the 16th of *June* 1837, *G. B. Pumfrett* wrote to *Philip Lucas Barnard* as follows:—“I am in hope that, in the course of a few days, I shall be enabled to place your money out on mortgage. The party, however, has not yet made up his mind if he mortgages or sells. Should he do the latter, the money will be useful to me, so that you need be under no apprehension respecting interest.”

The testator’s will was proved by *G. B. Pumfrett* on the 6th of *August* 1836.

In the month of *February* 1838, *G. B. Pumfrett* paid to *Philip Lucas Barnard* 99*l.* 19*s.* in part of his legacy of 500*l.*

The bill in this cause was filed on the 21st of *May* 1838, against *George Betts Pumfrett*, by the four sons of the testator’s sister *Mary*, and by Mr. and Mrs. *Skeet*, of whom *Philip Lucas Barnard* and *John Barnard* had attained the age of twenty-five years, and *Samuel* had  
 attained

attained twenty-one, but *Mrs. Skeet (a)* and *James* were still under twenty-one. It stated the facts above mentioned, and alleged that the Defendant had carried on his trade with property of the testator, and it charged that the Defendant was, under the circumstances, personally liable to pay and secure the legacies; and it prayed a declaration to that effect, and consequential accounts and directions; and that the Defendant might be charged with the profits made by carrying on the trade with property of the testator; and that the Plaintiffs might have a lien for the amount of the legacies upon all the testator's personal estate, and upon his real estate to the extent to which the personal estate had been applied in payment of debts.

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The Defendant, by his answer, stated that the testator's personal estate was insufficient for payment of his funeral and testamentary expenses, debts, and legacies, and that the payment made to *P. L. Barnard* of 99*l.* 19*s.*, had been made in ignorance that the testator's personal estate was liable to pay certain mortgage debts which were secured on his real estate, and under the impression that the testator's devised real estate was liable to pay the Plaintiffs' legacies.

He admitted that he had paid an annuity of 20*l.*, which the testator had bequeathed to *Ann Edis*, but he stated that such payment had been made in continuation of an annuity of 15*l.* which had been allowed to her by the testator in his lifetime, and of a further annuity of 5*l.*, which had been allowed to her by one *James Pumfrett*, deceased; although he considered that his payment of such annuity of 20*l.*, was in full satisfaction

(a) It did not appear that her marriage had been had with the consent required by the will.



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faction of any claim she might have under the will; and he intended to continue the payment, notwithstanding the deficiency of the personal assets of the testator.

He admitted a balance in hand, on account of the personal estate, of 553*l.* 11*s.*, which he claimed a right to apply in satisfaction of certain specialty debts of the testator, for which he was liable as heir at law. He denied that he had admitted assets to pay the legacies, but said that, erroneously believing, till otherwise advised, that the whole of the testator's estate was liable to pay the legacies, he had so written and spoken. He stated that all the property connected with the trade had been either given or sold to him by his father, at the dissolution of the partnership, with the exception of the freehold premises, with fixtures, upon which the trade was carried on, and which were let to him, by his father, at a rent of 160*l.* per annum; and he also stated, that, at the time of the dissolution, his father had made him presents of certain sums of money, which were entered in his father's books as having been paid to him. The Defendant's answer also suggested that the testator intended only to give one legacy of 500*l.* amongst his sister's children, and that the words "each of" were inserted by mistake.

The Defendant examined two witnesses in the cause, named *David Allen* and *John Warsop*, for the purpose of proving that his father gave up the trade to him.

The decree made by the Master of the Rolls, on the 12th of *June* 1840, declared that the Defendant, the heir at law of the testator, was personally liable to pay the several legacies of 500*l.* bequeathed to the Plaintiffs, and ordered that the Master should take an account of what was due for principal and interest on such of the legacies

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legacies respectively as were then due and payable; and ordered that the Defendant should pay to such legatees as had already become entitled, or the personal representatives of such of them as were or was dead, what the Master should certify to be due for principal and interest on the legacies; and ordered that the other legatees should be at liberty to apply, as their legacies should become payable; and ordered that the Defendant should pay the costs of the suit.

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The Defendant now appealed from so much of the decree as declared that he was personally liable to pay the legacies, and as ordered payment of those which had become payable, and as ordered him to pay the costs of the suit.

Mr. *Willcock*, in support of the appeal, referred to *Parker v. Fearnley* (a), and distinguished the present case from *Horsley v. Chaloner*. (b)

Mr. *Richards* and Mr. *Bilton*, *contra*.

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The LORD CHANCELLOR.

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If all that the Defendant has stated in his answer had been proved, and if the construction of the will contended for by him were to be assumed to be the true construction, this case would be one of much hardship and of some difficulty; but as no evidence is given as to any of the important facts stated (for no importance can be attached to the evidence of *David Allen* and *John Warsop*), I do not think that such character can be attributed to it. As to the construction of the will, whatever speculation may be indulged as to the real intention of the testator, it is quite clear that the terms

used

(a) 2 *Sim. & St.* 592.

(b) 2 *Ves. sen.* 83.

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used are such as to denote a gift of 500*l.* to each of the children of his sister *Mary*; and the ground upon which my judgment is founded, makes it unnecessary for me to express any opinion upon the other points suggested, and as to which the Defendant says that he was mistaken. If he was not mistaken, or if what he now claims as gifts from his father cannot be proved by him to have been so, and of that fact he has not given any evidence that can be relied upon, then the decree of the Master of the Rolls is as consistent with the real justice of the case as I believe it to be with the principles of law; and, in that case, the Defendant will have nothing to regret in the course he followed up to *March* 1838, when he seems, for the first time, to have entertained the idea of disputing the title of the Plaintiffs.

The testator died in *May* 1836, and the Defendant, his son, was the residuary legatee and devisee of all his real and personal estate, and, not only from his situation as son, but as partner with his father, must be supposed to have been well acquainted with the particulars of his property, and he must have been aware whether that portion of the property which he now claims as gifts from his father were so in fact, or constituted part of his property applicable to the payment of debts and legacies. With all these means of information, he finds, upon the will, legacies given of 500*l.* each to the nephews and nieces of his father, and an annuity of 20*l.* to their mother, his father's sister, who is since dead, and 20*l.* to another sister, *Mrs. Edis*. The Defendant, by a letter dated the 29th of *May* 1836, written by him to the Plaintiff *Philip*, informs him that he is entitled to a legacy of 500*l.* to be paid to him on his attaining twenty-five, and the same legacy to each of his brothers on their attaining the same age, and a similar sum to his sister on her arriving at twenty-one

one or marriage, and proceeds thus:—“The above legacies I assure you, my dear *Philip*, shall be most cheerfully paid to you all, in just compliance with your late dear uncle’s bequest.” “I shall, as soon as the legal time arrives for payment, give you a line, so that you may please yourself in what way you would like best to receive it.” This letter was written very shortly after the testator’s death, and before the will was proved. Under ordinary circumstances, therefore, there might not be just ground for binding the writer of it by what it contains. This case, however, is peculiar, from the knowledge the Defendant must have had of the property; and after he had proved the will, and up to *March* 1838, he not only did not say or do any thing recalling the representation and promise contained in that letter, but continued to act and to express himself in strict conformity to what he had so written. I do not find it proved at what time the Plaintiff *Philip* attained twenty-five, but it must, I presume, have been before the 16th of *June* 1837, for, by a letter of that date, the Defendant considers his legacy of 500*l.* as payable; for he says, “I am in hope that in the course of a few days I shall be enabled to place your money out on mortgage: the party however has not yet made up his mind if he mortgages or sells. Should he do the latter, the money will be useful to me, so that you need be under no apprehension respecting interest.” The money was not placed out on mortgage. The case, therefore, arose which was provided for by this letter, that of the Defendant borrowing and retaining it himself, and becoming, therefore, liable, by his own undertaking, to pay interest upon it; and so it has remained until the present time, except that, in the *February* following, 1838, the Defendant paid 9*l.* 1*s.* in part of this legacy. He also paid the annuity to Mrs. *Edis* from the death of the testator.

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These letters and this dealing with the legatee were an assent to the legacy; and an admission of assets to one is an admission to all.

It has been held that an executor, by taking a grant of a term from the person to whom it was bequeathed (*a*), or saying to the legatee that he intends him to have the legacy according to the devise (*b*), or that the legacy is ready for him whenever he will call for it, *Camden v. Turner*, stated in *Hawkes v. Saunders* (*c*), constitute a good assent to the legacy. In this case, all the circumstances which separately occur in those several cases are found combined. There is an assent to the legacy, a promise to pay it, and a borrowing of the sum given, by the executor, of the legatee. In the cases in which it has been held that the representative has become personally liable for a legacy, the liability has been put upon different grounds. In some, that what took place amounts to an admission of assets; in others, that the representative has, for a sufficient consideration, undertaken personally to pay. In *The Corporation of Clergymen's Sons v. Swainson* (*d*), payment of interest upon a legacy was held to be an admission of assets; and in *Campbell v. Lord Radnor* (*e*), the widow, executrix of her husband, by her will attempting to provide other means for payment of a legacy given by her husband's will, stating as a reason that his personal estate was out upon mortgage, was held to amount to an admission of assets to pay her husband's legacy. It does not distinctly appear in *Horsley v. Chaloner* (*g*) what had been done by the executor; but the Master of the Rolls seems to have held

(*a*) *Wentworth, Office of Executor*, 414.

(*b*) *Touchst.* 456.

(*c*) See *Cowp.* 293.

(*d*) 1 *Ves.* sen. 75.

(*e*) 1 *Bro. C. C.* 271.

(*g*) 2 *Ves.* sen. 83.

held him personally liable, upon a declaration that the legacy was ready at twenty-one. In *Hawkes v. Saunders* (a) the possession of assets was held to be a sufficient consideration to support a promise to pay a legacy by executors; and in *Childs v. Monins* (b), forbearance of a present demand, upon a promise by executors to pay it, with interest, was held to be a sufficient consideration to make the executors personally liable upon their contract. In this case, therefore, all the circumstances concur which have been held necessary to make an executor personally liable; and no attempt is made to support, by evidence, any case upon which the Court has thought it just to relieve executors from an incautious admission or liability.

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I am, therefore, of opinion that the decree of the Master of the Rolls is well founded, and that the appeal must be dismissed, with costs.

(a) *Cowp.* 289.

(b) *2 Brod. & Bing.* 460.

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## BETWEEN

*Joseph Burrough* the younger, *Abel Peyton*, and *Thomas Hull* an infant, under the age of twenty-one years, by the said *Abel Peyton* his next friend - Plaintiffs ;

## AND

*Anna Philcox*, *Benjamin Hull*, *Benjamin Lacey* and *Elizabeth* his wife, *John Shaw*, *William Cookes* and *Mary* his wife, *Edward Dalby Watson* and *Ann* his wife, *Thomas Goodwin*, *Thomas Draper* and *Eunice* his wife, *Richard Lacey*, *Alice Hull*, *Eunice Hull*, *John Walton Hull*, and *Thomas Roby*, and *Sarah Caroline Walmsley*, since deceased, *William Walton Lake* and *William Walton Lake* the younger, *Susannah Lake* and *James Phillips Lake*, *Susannah Floyd Farquhar* and *John Farquhar*, out of the jurisdiction of the Court - Defendants.

By original and amended bill.

## AND BETWEEN

*Joseph Burrough* the younger, and *Abel Peyton*, and *Thomas Hull* an infant, under the age of twenty-one years, by the said *Abel Peyton* his next friend  
Plaintiffs ;

## AND

*Thomas Goodwin* and *Ann Hale* - Defendants.

By bill of revivor.

## AND BETWEEN

*Joseph Burrough* the younger, and *Abel Peyton*, and *Thomas Hull* an infant, under the age of twenty-one years, by the said *Abel Peyton* his next friend  
Plaintiffs ;

AND

AND  
*John Goodwin* - - - Defendant.

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By bill of revivor.

AND BETWEEN  
*Benjamin Lacey* and *Elizabeth* his wife - Plaintiffs ;

AND  
*Anna Philcox, Joseph Burrough,* and *Abel Peyton, Benjamin Hull, John Shaw, William Cookes* and *Mary* his wife, *Edward Dalby Watson* and *Ann* his wife, *Thomas Draper* and *Eunice* his wife, *Richard Lacey, John Reeves* and *Alice* his wife, *Eunice Hull, John Walton Hull, Thomas Roby, William Walton Lake, James Phillips Lake, Ann Hale, John Goodwin, Joseph Sowler,* and *William Brown* and *Susannah* his wife, *Susannah Floyd Farquhar,* and *John Farquhar,* out of the jurisdiction of the Court - Defendants.

By bill of revivor and supplement.

BURROUGH v. PHILCOX.

April 29.

LACEY v. PHILCOX.


May 2.

Nov. 25.

**J**OHN WALTON, by his will, dated the 29th of February 1794, and executed and attested so as to pass freehold estates, gave to his daughter, *Ann Fox Walton*, the interest or dividends payable on 6000*l.* reduced 3 per cent. Bank annuities, for her life, for her separate use ; and declared it to be his will, that such 6000*l.* annuities should continue and remain standing, as they then were, in his (the testator's) name, "until all the

A testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed : " And after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of as after-mentioned, that was to say, the survivor of his two children should have power to dispose, by will, of his real and personal estate, "Amongst my nephews and nieces, or their children, either all to one of them or to as many of them as my surviving child shall think proper." Held that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of selection and distribution in his surviving child.




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the following contingencies are completed." He then declared that, on the decease of his daughter, he gave the interest or dividends of the above mentioned annuities towards maintaining, bringing up, and educating all her lawful children, until the youngest should be twenty-one years of age; then for the 6000*l.* annuities to be equally divided amongst all her children. But if his daughter should die without a child or children, or they should all die before they attained the age of twenty-one years and unmarried, then he gave the interest or dividends, as they became due and payable, unto his son *Thomas Walton*, for his life; and at his decease he gave the foregoing interest or dividends towards maintaining, bringing up, and educating all his lawful children, until the youngest of them should be twenty-one years old; then for the 6000*l.* reduced 3 per cent. Bank annuities to be equally divided amongst them; but if his daughter and son should both of them die without leaving lawful issue, "then for it to be disposed of as hereinafter." The remainder of what property he then had or might be possessed of at the time of his decease, in the said reduced 3 per cent. Bank annuities, he gave to his son *Thomas Walton*. He gave to his friends *Mr. Derringer*, *Mr. James Roby*, and *Mr. William Walmsley*, and their heirs, in trust, all his estate at *East Horsley* and *Effingham*, in *Surrey*, and all his estate at *Cam*, in *Gloucestershire*, and all his estate at *Scotforth*, near *Lancaster*, and a close of land near *Derby*, "for the following uses: — My intention is, that my said trustees shall have no further trouble in it, than to prevent the before mentioned estates being alienated before the following contingencies are completed. I give the rents, and the profits of the wood that is of a proper age and fit for felling for timber, of all my said estates, unto my son *Thomas Walton* for his natural life, and at his decease, unto any eldest son he may have lawfully born; and if his

his eldest should die without a son, then the estates should go to his second lawful son ; after his decease, to his eldest lawful son ; but if his second son should die without a lawful son, then for the estates to descend gradually down to the youngest son ; and if he should die without a son, then I give all the aforementioned estates unto my son's eldest daughter, for her natural life ; and if she has a lawful son, I give all the said estates unto him, on condition that he takes the surname of *Walton*. But if my son should die without leaving lawful issue, or such issue should all die without leaving lawful issue, then I give all the aforementioned estates unto my daughter *Ann Fox Walton*, for her natural life, she receiving the rents and profits thereof for her own use, and not to be subject to the control of any husband she might have, and not to be liable to the payment of any of his debts, and her receipt alone to be a sufficient discharge for such payment ; and, at the death of my said daughter, I give the said estates unto any lawful son she may have, on condition that he takes the surname of *Walton*, or to any grandson my daughter may have, on condition that he takes the surname of *Walton*. But in case my son and daughter should both of them die without leaving lawful issue, then for the said estates to be disposed of as shall be hereinafter mentioned, (that is to say) the longest liver of my two children shall have power, by a will, properly attested, in writing, to dispose of all my real and personal estates amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper. I give unto my above mentioned three trustees, the sum of ten guineas unto each of them for their trouble. I give unto my daughter, *Ann Fox Walton*, all my household furniture, plate, linen, china, glass, and books. I do hereby appoint my son *Thomas Walton* and my daughter *Ann Fox Walton*, if she should

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be unmarried at the time of my decease, to be joint executor and executrix of this my last will and testament. Wrote with my own hand, this 29th day of *January*, in the year 1794. *J. Walton.*"


The testator died in the course of the year 1794, leaving *Thomas Walton* his only son and heir at law, and *Ann Fox Walton* his only daughter. They were his only children living at the date of the will; and they proved his will, and paid his funeral and testamentary expenses, debts, and pecuniary legacies, without having recourse to the 6000*l.* stock, which remained standing in the testator's name until the decease of *Ann Fox Walton*.


*Thomas Walton* entered into possession of the real estates devised by the testator's will, and continued in such possession until the time of his death, having, as to the *Scotforth* estate, suffered a recovery in the Court of Common Pleas at *Lancaster*. By his will, dated the 15th of *April* 1813, he gave the *Scotforth* estate to his wife *Mary Walton*, for her life, with remainder to his sister, *Ann Fox Walton*, in fee; and, after giving to his sister five guineas for a ring, he gave all the residue of his personal estate to his wife, and appointed her sole executrix. He died in *February* 1825. Upon his death, his widow entered into possession of the estate at *Scotforth*, and she still continued in such possession; and his sister *Ann Fox Walton* entered into possession of the other estates, and continued in such possession until the time of her death; and she also, during her life, received the dividends upon the 6000*l.* stock.

*Ann Fox Walton*, by her will, dated the 4th of *October* 1828, gave her reversion in fee in the *Scotforth* estate under her brother's will to her kinsman *William Walton Lake*,

*Lake*, for life; with remainder to his eldest son *William Walton Lake* the younger, in fee; and gave to *John Walton Hull*, described as one of the sons of *John* and *Mary Hull* of *Castle Donington*, in *Leicestershire*, and his heirs, the before-mentioned close of land near *Derby*; and, after giving some pecuniary legacies, she bequeathed unto and amongst the children and grandchildren of her late kinswoman *Mrs. Ann Hull* of *Castle Donington*, except her two grandsons *Thomas Hull* and *John Walton Hull*, the sum of 1000*l.* stock reduced 3 per cent. Bank annuities, part of the monies then standing in the name of her (the testatrix's) late father *John Walton*, equally to be divided between them, share and share alike; and after directing that all the legacies and bequests therein-before mentioned should be paid and transferred to the legatees within twelve months after her decease, she bequeathed to her kinswoman *Sarah Caroline Walmsley*, the daughter of *William* and *Sarah Walmsley*, formerly of *Chelsea*, for her life, the dividends of 2000*l.* stock reduced 3 per cent. Bank annuities, other part of the monies then standing in the name of her late father; and she bequeathed to *Anna Philcox* and *Robert Hillier* the sum of 2000*l.* stock reduced 3 per cent. Bank annuities, other part of the monies then standing in the name of her late father, upon certain trusts for the benefit of *John Walton Hull* and his children; but if he should die under twenty-four, and without leaving any child or children (an event which happened), then she bequeathed the same stock to *Thomas Hull*; and she gave to *Joseph Burrough* and *Abel Peyton* all her real estate at *East Horsley* and *Effingham* and at *Cam*, to the use of *Thomas Hull* for life, with remainder to *Burrough* and *Peyton* during his life, as trustees to preserve contingent remainders; with remainder to his first and other sons, successively, in tail male; with remainder to the

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use of *John Walton Hull* for life; with remainder to his first and other sons, successively, in tail male; with remainder to the use of the youngest son, living at the time of her (the testatrix's) decease, of her kinsman the Rev. *John Roby* of *Congerstone*, in *Leicestershire*, and the heirs and assigns of such youngest son for ever; and she bequeathed to *Thomas Hull* the sum of 1000*l.* stock reduced 3 per cent. annuities, being part of the monies then standing in the name of her late father, and 2000*l.* new 4 per cent. annuities standing in her own name. And she bequeathed to *Burrough* and *Peyton* all the residue of her personal estate, upon trust to convert it into money, and to pay the produce of such conversion to *Thomas Hull*, on his attaining the age of twenty-four years, to whom she bequeathed the same accordingly, with a declaration that he should not be entitled to nor receive any or either of the legacies or bequests thereinbefore mentioned until he attained the full age of twenty-four years; but that all and every of the same legacies and bequests should remain invested in the stocks or funds thereinbefore mentioned at interest until he should attain that age; and with power to *Burrough* and *Peyton* to apply so much of the dividends, interest, rents, issues, and profits as they might consider necessary and proper for his education, clothing, bringing up, and advancement in the world, and to accumulate the remainder till he should attain twenty-four, and then to pay the same to him, together with the principal; and in case he should die before attaining twenty-four, and should leave any child or children, then the testatrix bequeathed all the same legacies and bequests to such children or child, equally to be divided between them, if more than one; but in case he should die before twenty-four, and without issue, she bequeathed the same, in manner therein mentioned, for the benefit of *John Walton Hull* and his children; and in

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case he should die before attaining twenty-four, and without issue, then unto and amongst all the children and grandchildren of her before-mentioned late kinswoman Mrs. *Ann Hull*, equally to be divided between them; and she appointed *Anna Philcox* and *Robert Hillier* her executrix and executor.

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*Thomas Walton* and *Ann Fox Walton* both died without issue.

The *John Walton Hull*, mentioned in *Ann Fox Walton*'s will, died in her lifetime, an infant, of the age of three years; but another *John Walton Hull* (a Defendant) was born between the date of her will and the time of her death; and the testatrix herself died on the 30th of July 1831, without having been married, leaving *Joseph Osborne*, *Thomas Goodwin*, *Sarah Caroline Walmsley*, and *William Walton Lake* her co-heirs at law, and also co-heirs of *Thomas Walton* and the testator *John Walton*. *Anna Philcox* and *Robert Hillier* proved her will, and *Hillier* afterwards died.

At the time of the death of *Ann Fox Walton*, one nephew and one niece of the testator *John Walton*, and eleven children of deceased nephews and nieces were living. The nephew was *William Walton Lake*, and the niece was *Susannah Floyd Farquhar*; and the eleven children of nephews and nieces were *Benjamin Hull* and *Elizabeth Lacey*, children of *Ann Hull*, who had been a niece of the testator; and *Joseph Osborne*, *John Shaw*, *Mary Cookes*, *Ann Watson*, *Sarah Caroline Walmsley*, *William Walton Lake* the younger, *Susannah Lake*, afterwards *Brown*, *James Phillips Lake*, and *John Farquhar*.

In November 1832, *Joseph Osborne* died, intestate, leaving *Thomas Goodwin*, *Sarah Caroline Walmsley*, and  
*William*

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*William Walton Lake* his co-heirs at law; but no person became his legal personal representative until after the institution of the original suit.

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*Mary Walton*, the widow of *Thomas Walton*, by deed dated the 8th of *April* 1833, assigned to *Burrough* and *Peyton* what was described as all *Thomas Walton's* moiety of the 6000*l.* stock, and the dividends of it since *Ann Fox Walton's* death, so far as she (*Mary Walton*) had any interest therein, upon the trusts upon which they would have held the same, in case *Ann Fox Walton* had become the absolute owner of the fund, discharged of all right or interest of *Thomas Walton* or of herself (*Mary Walton*) as his executrix and residuary legatee, either by reason that he was one of the testator's next of kin, or that there was any defect in *Ann Fox Walton's* will, and so that, as to legacies intended to be given by way of appointment but which had lapsed, the lapse might be for the benefit of *Ann Fox Walton's* residuary legatees.

Two children and six grandchildren of *Ann Hull* were living at the time of *Ann Fox Walton's* death. The two children were *Benjamin Hull* and *Elizabeth Lacey*; and the six grandchildren were the infant Plaintiff *Thomas Hull*, and the Defendants *Eunice Draper*, and *Richard Lacey* (children of *Elizabeth Lacey*), *Alice Hull* (afterwards *Reeves*), *Eunice Hull*, and *John Walton Hull*; and no grandchild of *Ann Hull* had been born since *Ann Fox Walton's* death.

The Defendant, *Thomas Roby*, was the youngest son of *John Roby* of *Congerstone*, living at *Ann Fox Walton's* death.

*Dernger* and *Walmsley*, two of the trustees named in the will of the testator *John Walton*, died in the lifetime of their co-trustee *James Roby*, and he died in *September* 1822,

1822, intestate as to *John Walton's* trust estates; and it was not known at his death who was his heir. *Sarah Caroline Walmsley* resided in *France*. *William Walton Lake*, and *William Walton Lake* the younger, *Susannah Lake*, and *James Phillips Lake* resided in *America*; and *Susannah Floyd Farquhar* and *John Farquhar* resided in *Scotland*.


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Shortly after *Ann Fox Walton's* death, *Burrough* and *Peyton* entered into the receipt of the rents of the estates at *East Horsley*, *Effingham*, and *Cam*, and the close of land near *Derby*.

The original bill in this cause was filed in the year 1833, praying that the trusts of the wills of *John Walton* and *Ann Fox Walton* might be carried into execution under the decree of the Court, and that the interests of all parties in the 6000*l.* stock, and in the real estates of *John Walton*, might be ascertained and declared.

The Defendants, *Sarah Caroline Walmsley*, *William Walton Lake*, *William Walton Lake* the younger, *Susannah Lake*, *James Phillips Lake*, *Susannah Floyd Farquhar*, and *John Farquhar*, were out of the jurisdiction, but all the other Defendants appeared, and answered the bill, and *Sarah Caroline Walmsley* having afterwards come within the jurisdiction, appeared to the bill, but died intestate before answering it, leaving *Thomas Goodwin* and *William Walton Lake*, who was then still out of the jurisdiction, her co-heirs at law; and on the 13th of *May* 1834, the Plaintiffs in the original suit filed a bill of revivor against *Thomas Goodwin*, and against *Ann Hale*, as *Sarah Caroline Walmsley's* personal representative; and *Ann Hale* afterwards answered the original bill, and the usual order of revivor was made against her and against *Thomas Goodwin*.



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Before the cause was heard, *Thomas Goodwin* died intestate, leaving *John Goodwin* his heir, who also became his legal personal representative, and against whom the suit was revived in the usual manner.

In the month of *October* 1834 *William Walton Lake* the younger died intestate, leaving his father, *W. W. Lake* the elder, his heir at law.

The cause was heard, before the Vice-Chancellor, on the 11th of *March* 1836, when a decree was made, directing inquiries as to the nephews and nieces, and children of nephews and nieces, of the testator, *John Walton*, living at the death of the survivor of *Thomas Walton* and *Ann Fox Walton*, and as to who was the youngest son of *John Roby* of *Congerstone* living at the decease of *Ann Fox Walton*; and all further directions were reserved.

Under an order in the cause, dated the 9th of *June* 1836, the 6000*l.* stock, which had, up to that time, continued standing in the name of the testator *John Walton*, and the dividends accrued upon it since *Ann Fox Walton*'s death, after a certain deduction for costs, were brought into Court.

On the 7th of *February* 1837, the Master made his report, by which, in answer to the enquiries directed at the hearing, he found such of the facts above mentioned, as are applicable to those enquiries.

On the 1st of *December* 1837, *Thomas Hull* died, under twenty-four and under twenty-one, but of the age of twenty years, having made a will on the 28th of *December* 1835, by which he appointed *Joseph Souther* his executor, who proved his will.


*William*

*William Walton Lake* took out administration to *Joseph Osborne*, and to *William Walton Lake* the younger.

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On the 22d of *March* 1838, the bill in the suit, *Lacey v. Philcox*, was filed by *Benjamin Lacey* and *Elizabeth* his wife, who was a child of the testator's niece *Ann Hull*, against all the parties to the first suit, and the representatives of such as were dead, as a bill of revivor and supplement to supply the defects which the various deaths had occasioned.

On the 23d of *November* 1838, a decree was made in the cause of *Lacey v. Philcox*, by which, the Plaintiffs were declared entitled to the benefit of the former suits and proceedings; and the Master was directed to inquire whether the son and daughter of *John Walton* the testator both died without leaving lawful issue, and whether *John Walton Hull*, the devisee and legatee named in *Ann Fox Walton's* will, died in her lifetime without issue, and whether *Thomas Hull*, the late Plaintiff in the former suit, died without issue, and what was his age at the time of his death, and whether there were then any, and, if any, what legal personal representatives of *Joseph Osborne* and *William Walton Lake* the younger, and what children and grandchildren of *Ann Hull*, other than the late Plaintiff *Thomas Hull*, were living at the decease of *Ann Fox Walton*, and whether any grandchildren of *Ann Hull* were born after *Ann Fox Walton's* death, and in the lifetime of *Thomas Hull*, and whether any or either, and which, of the children or grandchildren of the said *Ann Hull*, other than as aforesaid, who were living at the decease of the testatrix, or any or either, and which of the children or grandchildren of the said *Ann Hull* since born, had died, and, if so, who were their legal personal representatives; and whether

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the Defendants *William Brown* and *Susannah* his wife, *Susannah Floyd Farquhar*, and *John Farquhar*, were living out of the jurisdiction; and it was ordered, that so much of the 6000*l.* reduced annuities as would be sufficient to raise the amount of certain costs, charges, and expenses, should be sold, and applied in payment of such costs, charges, and expenses; and further directions and subsequent costs were reserved.

On the 6th of *March* 1839, the Master made his report in pursuance of this decree, finding in answer to the enquiries directed by it, such of the facts above mentioned, as are applicable to those enquiries, and finding that the Defendant *William Brown*, husband of *Susan* (not *Susannah*) *Brown*, was dead; and that *Susan Brown* was then resident at *Castle Donington*; and that the Defendants, *Susannah Floyd Farquhar* and *John Farquhar*, were residing in *Scotland*, and out of the jurisdiction of the Court.

The suits now came on to be heard on further directions.

Mr. *Richards* and Mr. *John Baily*, Mr. *Wigram* and Mr. *Kenyon Parker*, Mr. *Skirrow* and Mr. *Smythe*, Mr. *Tinney* and Mr. *Shadwell*, and Mr. *Cooper*, for different parties claiming under *Ann Fox Walton's* will, contended that no trust was created by *John Walton's* will, in favour of his nephews and nieces, and children of nephews and nieces living at the death of the survivor of his son and daughter, but that a mere power of appointment amongst them was given to such survivor: that the only cases in which words of power had been held to create a trust, were cases in which the whole interest had been given by the will to the donee of the power; in which cases there would have been an  
 absurdity

absurdity in construing the words of power as creating any thing less than a trust; for the party having an absolute interest might, of course, dispose of that interest as he thought fit, without words of power to enable him so to do: That it was clear, that the testator in this case knew how to create a trust, from the manner in which he had given the property to a set of trustees: That in the case of *Harding v. Glyn* (a), which would be relied on, on the other side, both the gift of the absolute interest and the use of precatory words, amounting to the creation of a trust, concurred; that *Brown v. Higgs* (b), which would also be much insisted upon, clearly rested upon *Harding v. Glyn*, and was a case in which Lord Eldon felt great difficulty, as appeared from *Whitmore v. Trelawny* (c); and that the case of the *Duke of Marlborough v. Godolphin* (d), in which, notwithstanding words of desire on the part of the testator, it was held that a mere power was given, was inconsistent with *Harding v. Glyn*, and was so felt to be by Lord Eldon: That there was an observation of Sir W. Grant in *Longmore v. Broom* (e), which put *Brown v. Higgs* on its right footing, viz. that a gift to A. or B. was void for uncertainty, but that a gift to A. or B. at the discretion of C. is a valid devise, for nothing is wanting but the exercise of the discretion on the part of C.: That in *Brown v. Higgs* Lord Alvanley construed "or" as "and," but that that could not be done in this case: That the only two cases on this subject, subsequent to *Brown v. Higgs*, were *Grant v. Lynam* (g) and *Brown v. Pocock* (h), in the former of which the supposed power had been actually exercised, and the only question was, whether it had been exercised in

favour

(a) 1 Atk. 469.

(b) 4 Ves. 708., 5 Ves. 495.,  
8 Ves. 561.

(c) 6 Ves. 129.

(d) 2 Ves. sen. 61.

(e) 7 Ves. 124.

(g) 4 Russ. 292.

(h) 6 Sim. 257.

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favour of the right objects; and in the latter, a case which arose upon petition only, the fund in question had been derived from the testatrix's property generally, and the consequence of a different determination would have been, that there would be an intestacy, which the Court is always anxious to avoid; and the supposed power, being required to be exercised in favour of all the children, was much more in the nature of a trust than an exclusive power of selection, such as that given in the present case.

They also relied on *Bull v. Vardy* (a); and *Sale v. Moore* (b); and referred to *Grievson v. Kirsopp* (c), *Moggridge v. Thackwell* (d), *Harland v. Trigg* (e), and *Countess of Bridgewater v. Duke of Bolton* (g), and the cases on this subject collected in *Sugden on Powers*. (h)

Mr. *Hodgson* (in the absence of Mr. *Stuart*), *contra*, for parties claiming as objects of the power, argued that the interest taken by *Ann Fox Walton* was a species of ownership which might be made the subject of a trust, and had been made the subject of a trust: That there might well be a limit of a power as of an estate; that the testator's words "then to be disposed of as hereinafter mentioned" were imperative, and strongly marked his intention; and that, in reality, there was no substantial difference between the expressions he had used, and a declaration that the property should be held in trust for such of his nephews and nieces and children of his nephews and nieces as the survivor of his two children should appoint, which would, undoubtedly, create a trust: That the testator would not have vested the legal fee

simple

(a) 1 *Ves.* jun. 270.(b) 1 *Sim.* 534.(c) 2 *Keen.* 653.(d) 1 *Ves.* jun. 464.(e) 1 *Bro. C. C.* 142.(g) *Salk.* 236.(h) Vol. ii. p. 173, *et seq.*

simple of the real estate in trustees, if he intended that, after a certain series of limitations ending in a power, the estate should descend to an heir at law: that the construction contended for on the other side would strike out a great part of the testator's will: That as the gift in *Ann Fox Walton's* will to the children and grandchildren of *Ann Hull* the testator's niece was bad, so far as the grandchildren were concerned, the Court would hold it void altogether: for it could not distinguish the aliquot shares given to children and grandchildren. He relied upon *Harding v. Glyn*, *Brown v. Higgs*, and *Witts v. Boddington (a)*, as stated from the Registrar's Book by Lord *Alvanley* in *Brown v. Higgs (b)*, *Venables v. Morris (c)*, *Brown v. Pocock (d)*, and *Grieveson v. Kirsopp (e)*. He submitted that it was a fallacious mode of expression to say, as had been said, in speaking of *Brown v. Higgs*, that the Court sometimes read "or" as "and;" it should rather be said, the Court sometimes considered "or" as being used in the conjunctive. He said that the discrepancy between the cases of *Harding v. Glyn* and *The Duke of Marlborough v. Lord Godolphin* had been disposed of by Lord *Eldon*, in his observations towards the close of his judgment in *Brown v. Higgs*.

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Mr. *Bethell*, Mr. *Loftus Lowndes*, Mr. *Sharpe*, Mr. *Reynolds*, for other parties in the same interest.

Mr. *Norton* for the trustees, *Burrough* and *Peyton*.

The cases of *Grant v. Lynam (g)*, *Walsh v. Wallinger (h)*, *Birch v. Wade (i)*, *Forbes v. Ball (k)*, and *Kemp v. Kemp*,

(a) 3 Bro. C. C. 95.

(b) See 5 Ves. 503.

(c) 7 T. R. 342, 438.

(d) 6 Sim. 257.


(e) 2 Keen, 655.

(g) 4 Russ. 292.

(h) 2 Russ. & Myl. 78.

(i) 3 V. & B. 198.

(k) 3 Mer. 437.

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v. *Kemp* (a), were referred to, in addition to those above mentioned.

Mr. *Richards*, in reply.

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It was agreed that no question of election, as arising upon *Ann Fox Walton's* will, should, at present, be discussed.

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Nov. 25.

*The* LORD CHANCELLOR.

The testator directed the dividends of 6000*l.* stock, then standing in his name, to be paid to his daughter for life, and he directed that the stock should remain in his name, "until the following contingencies are completed." After the death of his daughter, he disposed of the stock for the benefit of her children, and if she should not leave children, he gave the dividends to his son, for life, and, after his decease, the principal to his children; "but if my daughter and son should both of them die without leaving lawful issue, then for it to be disposed of as hereinafter." He gave to trustees and their heirs certain estates, describing them, "for the following uses. My intention is, that my said trustees shall have no further trouble in it, than to prevent the aforementioned estates being alienated before the following contingencies are completed." He then gave the rents to his son for life, and, after his death, to his son's sons and daughters, in terms which I think would have given to those sons and daughters estates tail, and, upon failure of such issue of his son, he gave his estates to his daughter *Ann Fox Walton*, for life, and, after her death, to her son, if any; "but in case my son and daughter should both of them die with-

out

(a) 5 *Ves.* 849.

out leaving lawful issue, then for the said estates to be disposed of as shall be hereinafter mentioned, that is to say, the longest liver of my two children shall have power, by a will, properly attested, in writing, to dispose of all my real and personal estates amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper."

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The question is, whether these nephews and nieces and their children, take any interest in the property, independently of the power; that is, whether the power given to the survivor of the son and daughter is a mere power, and the interests of the nephews and nieces and their children were, therefore, to depend upon the exercise of it, or whether there was a gift to them, subject only to the power of selection given to the survivor of the son and daughter.

Before I refer to the authorities, it will be proper to consider what appears, upon the will, to have been the testator's intention, in the event which happened, of his son and daughter dying without children; and, first, as to the personal estate, of which the capital of the 6000*l.* stock would, in that event, form part, it was to remain in trust until the contingencies mentioned in his will should have happened; that is, at all events, until the death of the survivor of the son and daughter, and, in my construction of the will, until the interests of the nephews and nieces and their children should have been ascertained; but if no interest were to arise in such parties, except by the execution of the power, then all such stock and other personal estate, from the moment of the testator's death, was undisposed of, if such power should not be executed, and, subject to that contingency, became the property of the testator's son and daughter, as his

next



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next of kin ; so that they might defeat the interests of the nephews and nieces and their children, by agreement during their joint lives, and giving to the survivor, as to all such survivor's share in the personalty in which he or she would have an absolute property, a power to appoint to and amongst a particular class. The observation with respect to the land is still stronger ; the devise to trustees is "to prevent the lands being alienated before the following contingencies are completed," one of which is the creating or ascertaining the estates and interests of the nephews and nieces and their children ; whereas, if these parties were to take no estates or interests, except through the execution of the power, the son, as heir, if he survived his sister, would, upon failure of their issue, be absolute owner of the property, as would the sister surviving, unless the son had disposed of his fee, subject to the execution of the power by the sister. There is, therefore, scarcely any supposable event in which the giving this power would, upon that supposition, give to the donee any dominion over the property, or be at all likely to secure any benefit to the declared objects of it. It would be unfortunate if the authorities made it necessary for me to put a construction upon this will leading to such results.

If I had to decide this case with no other authority to guide me but *The Duke of Marlborough v. Lord Godolphin*(a), I should have great difficulty in giving effect to what I cannot doubt having been the testator's intention ; but, highly as I venerate the character of Lord *Hardwicke* as a lawyer, I am not only at liberty, in weighing that authority, to consider how it has been dealt with in subsequent cases, but I am bound so to do. One thing, however, may be observed upon this case. By the codicil,


(a) 2 Ves. sen, 61.

codicil, as stated by Lord *Alvanley*, from the Registrar's Book, in *Brown v. Higgs* (a), the legacy was given to the executors as trustees, so that the mother of the children had only an estate for life, the fund itself being in trustees: but it does not appear to have occurred to Lord *Hardwicke*, that this was of any importance in putting a construction upon the will, respecting interests being or not being given to the children, independently of the power. *Harding v. Glyn* (b) was a case in which there was a gift, to the donee of the power, of the property itself, with a desire, as to the mode of disposing of it, amounting to a trust; but that declaration of trust only ascertained the class amongst which it was to be exercised; it was "amongst such of my own relations as she shall think most deserving and approve of;" and yet Lord *Hardwicke*, at the conclusion of his judgment in *The Duke of Marlborough v. Lord Godolphin* (c), is made to say, that in all the cases cited for the Defendants, the bequest amounted to a legacy to all the children, so that the proportions only were left to the appointor.

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In *Witts v. Boddington* (d), the gift to the testator's wife was of the use and enjoyment of the property for her life, with power, by her will or otherwise, to give the same amongst one or more of the children of his daughter *Martha*, in such manner and proportions as she should think proper; but in case no such child should be living at his wife's death, then he desired and directed her to leave the same to other parties. There were children of *Martha* living at the wife's death; but she attempted to leave the property to the other

(a) See 5 *Ves.* 506. (c) 2 *Ves.* sen. 61., see p. 83.  
(b) 1 *Atk.* 469., and stated (d) 3 *Bro. C. C.* 95. and stated  
from the Registrar's Book, 5 *Ve* from the Registrar's Book in  
501. 5 *Ves.* 503.

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other parties named by the testator, and it was held that *Martha's* children were entitled. This is a case in which the donee of the power had only a life estate, and where there was a power of selecting any of the favoured class; but there was, in that case, no doubt of the intention in favour of *Martha's* children if there should be any living at the death of the wife. If the intention in favour of the nephews and nieces and their children in this case be sufficiently apparent, that case is directly in point.


These and other cases shew that when there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises, as stated by Lord *Eldon* in *Brown v. Higgs (a)*, of the power being so given as to make it the duty of the donee to execute it; and, in such case, the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit.

Many other cases, of an earlier date than *Brown v. Higgs*, might be referred to; but the whole doctrine was so fully discussed, and so maturely considered by Lord *Alvanley* and Lord *Eldon* in that case, that it is not necessary to advert to them. In *Brown v. Higgs*, twice heard before Lord *Alvanley*, as reported in 4 *Ves.* 708. and 5 *Ves.* 495., and before Lord *Eldon*, upon appeal, as reported in 8 *Ves.* 561., and affirmed in the House of Lords, 2 *Sugden on Powers*, 176., the facts were, that the testator

(a) See 8 *Ves.* 574.

tator bequeathed a leasehold estate to *John Brown*, upon trust to permit his wife to receive a certain sum out of the rents, and to pay other sums thereout; and after the above trust was performed, he authorized and empowered *John Brown* to receive the remainder of the rents, and to dispose of it in manner following, that is to say, to take 100*l.* per annum for his own use, and to employ the remainder of the rents, after paying certain necessary expenses, to such children of his nephew *Samuel Brown*, as *John Brown* should think most deserving, and as would make the best use of it; or to the children of his nephew *William Augustus Brown*, if any such there should be. *John Brown* died in the testator's lifetime. There were children of *Samuel Brown*, but none of *William Augustus Brown*. The decree declared that, in consequence of the death of *John Brown* in the testator's lifetime, the rents were well bequeathed in trust for all the children of *Samuel Brown*, and the children of *William Augustus Brown*, if there were any. Lord *Alvanley* said that he considered the bequest as equivalent to saying that he gave to the children, with a power to *John Brown* to select any he thinks fit, and to exclude the others; and that the fair construction was, that, at all events, the testator meant that the property should go to the children. Upon these facts it is to be observed, that there was no gift to the children, except in the authority and power given to *John Brown* to pay to such of them as he should think proper; and, although the property was intended to vest in *John Brown*, it never did so in fact; and that the decision was founded upon this, that there was sufficient indication of an intention in favour of the children, as a class, to justify the Court in giving it to them; and that, although the word "or" is used in the will, both sets of children were held to be entitled.

The

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The case was reheard before Lord *Alvanley*, and the authority of *The Duke of Marlborough v. Lord Godolphin* pressed upon the Court, and it was argued that when a gift is through a power, and the power is not exercised by the donee, the Court cannot execute it. Lord *Alvanley*, in giving judgment, and adhering to his former judgment, answered this argument by denying that he had proposed to execute the power, but said that the question was, whether an intention appeared that the children were the objects to whom the testator meant to give the interest, with a power only in *John Brown* to select or apportion. Lord *Eldon* affirmed this decree, saying that, upon the probable intention, his inclination to the opinion of Lord *Alvanley* was too strong to permit him, upon any doubt he entertained upon that obscure will, to say that there was not intention enough to justify the declaration which had been made; resting, therefore, the decision upon the question of intention, and finding sufficient proof of the intention to give to a class, in an authority and power, confided to another, of selection and distribution amongst such class.

In this case, the intention is not to be found only in the power given to select and distribute; for the testator has directed his trustees to hold the property until the contingency has happened, and, as to the land, that it shall not be alienated in the meantime, and has himself declared, that, in the events which have happened, the property should be disposed of as after-mentioned. This is imperative, and is conclusive as to the intention that the subsequent gift should take effect; but the only disposition after-mentioned is the provision for the nephews and nieces, and their children, subject to the selection and distribution of the survivor of his son and daughter.

Much

Much argument was urged at the bar upon the ground that the donee of the power had no estate in the property under the will beyond a life interest. In my view of the case, this is quite immaterial. It is not, certainly, one of those cases in which property is given, with expressions added, as to the disposal of it, which are held to fix a trust upon the gift; but the whole is given to trustees, and the question is, whether there be found in the will a sufficient declaration of who, in the events which have happened, are to be the *cestuis que trust*; and if that be sufficiently expressed, it is immaterial, whether the donee of the power be also a trustee, or whether the trust be vested in others.

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In *Birch v. Wade* (a) the property was given in trust, and the donee of the power was only tenant for life.

In this case, upon the authority of *Brown v. Higgs*, I think myself justified in giving effect to the intention, which appears to me to be sufficiently apparent upon the will, of giving the property to the nephews and nieces, and their children, subject to the selection and distribution of the survivor of the son and daughter; and that they all constitute the class to take all the property as to which no such selection and distribution has been made.

(a) 5 Ves. & Bea. 198.

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*April 29.*

FURZE and Others v. SHARWOOD and Others.

Where a defect of parties appears upon the bill, costs of the day will be allowed to the Defendant at the hearing, although he has not taken the objection by his answer.

**T**HIS cause coming on for hearing, and being opened, an objection for want of parties, grounded upon the statement of a document in the bill, was taken on behalf of one of the Defendants, and was allowed by the Lord Chancellor. No notice of this objection had been given by the answer; but, upon its being allowed, the Defendant's counsel applied for the costs of the day.

The Plaintiffs' counsel opposed this application, upon the ground that the objection had not been taken by the answer; and it was said that the Lord Chancellor had always refused the costs of the day, when the Defendant had not taken the objection by his answer.

*The* LORD CHANCELLOR said, that that rule applied to the case in which the objection depended on a fact within the Defendant's knowledge, which he did not bring forward by the answer; but was inapplicable to a case like the present, where the defect of parties appeared by a statement in the bill: and his Lordship, therefore, ordered the Plaintiffs to pay the costs of the day.

*Mr. Spence, Mr. Wigram, Mr. Bethell, and Mr. Teed,* were counsel in the cause.

1839.

STURGIS v. CHAMPNEYS.

Aug. 2.  
Nov. 7.

**T**HE Plaintiff in this cause was the provisional assignee of the estate of an insolvent debtor, whose wife was entitled, for her life, to large landed property, of which the legal estate was outstanding in mortgagees.

The assignee of an insolvent debtor, whose wife was entitled for life to real property, being obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being vested in mortgagees: Held, bound to make a provision for the wife.

The Defendants were the insolvent debtor and his wife and their receiver of the estates, and the assignees under a subsequent insolvency.

The circumstance of the legal estate being outstanding having made it necessary for the assignee to come into this Court to make his title (subject to the incumbrances) effectual, the question which came before the Lord Chancellor, upon the wife's appeal from a decree of the Vice-Chancellor, was, whether the assignee was not bound to make a provision for the wife out of the rents and profits.

The facts of the case, and the arguments urged upon the appeal, sufficiently appear from the Lord Chancellor's judgment.

Mr. *Stuart*, Mr. *Hodgson*, and Mr. *Parry*, supported the appeal.

Mr. *Wakefield*, Mr. *Wigram*, and Mr. *Reynolds*, for the Plaintiff, and Mr. *Jacob*, Mr. *Richards*, and Mr. *Chandless*, for the assignees under the second insolvency, supported the decree.



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Mr. *Rogers* appeared for a purchaser under the second insolvency.

It was contended by the counsel for the assignees under the second insolvency, that the wife's life interest in the estates could not be considered as an equitable interest, merely on the ground that the legal estate might be outstanding; and that the Court had never made a provision for a wife out of such an interest as the husband in the present case had, and that it was not established that the wife's equity to a provision extended to the rents of real estate.

Nov. 7.

*The* LORD CHANCELLOR.

The title to the property in question, stated by the bill to be of the value of 10,000*l.* per annum or thereabouts, is under the will of Sir *Roger Mostyn*, by which, after giving certain annuities to his unmarried daughters, which were to cease upon their marriage, he devised all his real estate to trustees, for a term of 500 years, upon trust by and out of the rents and profits, or by sale, to pay so much of his debts, funeral expenses, legacies, and annuities, as his personal estate not specifically bequeathed should be defective to pay; and, subject to that term, he devised his estate to his son for life, remainder to his sons in tail, remainder to the same trustees for a term of 1000 years, upon trust, after any of his daughters should come into possession upon failure of issue of his son, by sale or mortgage, to levy, raise, and pay to each of his other daughters then living 10,000*l.*, and, subject to the trusts of such term, to the use of his eldest daughter and her issue, with remainder to the use of his second daughter, Lady *Champneys*, for life, with remainder to her first and other sons in tail male, with remainders over.

*The*

The bill then states the death of the son, without issue, in 1831, and the previous death, without issue, of the eldest daughter, and that Lady *Champneys*, therefore, upon the death of the son, became entitled as tenant for life. It then states that two of the daughters of the testator remaining unmarried were entitled to their annuities under the 500 years' term, but that all arrears had been paid, and that a sum of 41,000*l.* had, under a decree of this Court, been raised to satisfy the trusts of the 1000 years' term, and that all the estates, except part included in a former mortgage for 7000*l.*, had been mortgaged to the parties who advanced the 41,000*l.*, and that the legal estate in all the property was vested either in the mortgagees of the 41,000*l.* or of the 7000*l.* (a) Having before stated that Sir *Thomas Champneys* in 1827 had taken the benefit of the Insolvent Debtors' Act, and had executed the usual conveyances of his property, and that the Plaintiff had been appointed assignee, and that Sir *T. Champneys* had again taken the benefit of the act in 1834, the bill alleged, that owing to the legal estate being vested in or held in trust for the several mortgagees, the Plaintiff was unable to take or obtain possession of the lands, or to enter into receipt of the rents and profits by means of any legal process, and it prayed a declaration of the title of the Plaintiff, as such assignee, to the life estate of Lady *Champneys* during the coverture, subject to the prior incumbrances, and for the consequential relief. (b)

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The

(a) The bill contained allegations that the legal estate, in fee simple, and not for the terms only, had become vested in the mortgagees; but the reporters have not been able to ascertain whether this statement was ac-

curate; and, perhaps, it is not material to the present case.

(b) Viz. an account and payment of the rents; the appointment of a receiver by the court; and, if necessary, a sale of the Plaintiff's interest.

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The Defendant, Lady *Champneys*, by her answer, stated, that she had, to enable her husband to pay his debts, given up the settlement upon the marriage, and had derived no maintenance from her husband since 1824, and claimed a settlement and maintenance out of the rents and profits of her own estate.

The cause was heard, before the Vice-Chancellor, on the 22d of *July* last, when his Honor, by his decree, declared that the Plaintiff, as such assignee, was entitled to the estates and the rents and profits thereof, from the death of the testator's son, during the coverture of Lady *Champneys*, subject to the prior charges and incumbrances, and that Lady *Champneys* was not entitled to any settlement or allowance for her maintenance and support out of the rents and profits thereof; and he dismissed the bill, as against her, with costs, and he referred it to the Master to take an account of the rents and profits received by Sir *Thomas Champneys* since the date of his last discharge by the Insolvent Debtors' Court.

The effect of this decree is to give, by the interposition of this Court, to the assignee of an insolvent husband, the whole of the income of the life estate of the wife, leaving her entirely destitute. (a)

I have not had the advantage of seeing any note of the judgment of the Vice-Chancellor, and have therefore no other knowledge of the grounds upon which it was founded, than what I was able to collect from the

argument

(a) The cause was now brought before the Lord Chancellor by an appeal petition presented by Lady *Champneys*, praying that the decree might be reversed or

varied so far as respected herself, and that she might be declared entitled to a provision out of the income of the estates.

argument of the counsel who appeared before me in support of it; and, as I understood that argument, it was contended that this Court will not secure a provision for a wife, unless the property be such as to be a proper subject of equity; and that, in this case, the devise to Lady *Champneys* is of a legal estate for life, and that it is by the accident only of the prior incumbrance being still subsisting, that the Plaintiff is compelled to come into this Court. Undoubtedly, for many purposes, this Court, acting upon the principle of following the law, deals with property coming under its cognizance from the legal estate being outstanding, according to the rights which would exist at law; but that is far from being universally true. *Cholmondeley v. Clinton (a)*, and the authorities upon which that decision was founded, are instances to the contrary. There are many cases in which this Court will not interfere with a right which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such as in cases of subsequent incumbrancers without notice gaining a preference over a prior incumbrancer by procuring the legal estate. It may be to be regretted, that the rights of property should thus depend upon accident, and be decided upon, not according to any merits, but upon grounds purely technical. This, however, has arisen from the jurisdiction of law and equity being separate, and from the rules of equity, (better adapted than the simplicity of the common law to the complicated transactions of the present state of society,) though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the courts of common law.

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Hence

(a) 2 Mer. 171, 2 J. & W. 1.

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Hence arises the extensive and beneficial rule of this Court, that he who asks for equity must do equity, that is, this Court refuses its aid to give to the Plaintiff what the law would give him, if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce. If, therefore, this Court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband who claims against both, in recovering property of the wife, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with a rule by which it regulates its proceedings in other cases.

It was argued, that it having been held in *Lady Elibank v. Montolieu* (a), that the wife may come into this Court to assert her title to a settlement, the claim could no longer be put upon the ground of compelling the husband or his assignee seeking equity to do equity. In this case, the assignee is Plaintiff, and it is not therefore necessary to go beyond the facts now before me. If that case be applicable to the present, it would only prove that *Lady Champneys* might herself have come into this Court as Plaintiff, to claim that which she now asks to have imposed as a condition of the decree sought by her husband's assignee. The existence of this higher equity could not deprive her of what she so asks.

I am disposed to take this view of the case, because, if the authorities support *Lady Champneys's* equity as  
 a condition

(a) 5 Ves. 737.

a condition which this Court imposes as the price of the assistance which the assignee asks of the Court, the nature of the estate of the wife in the subject-matter in contest does not seem to be important.

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Upon a careful examination of the authorities, I do not find the time at which the Court did not exercise this jurisdiction in favour of the wife. In *Bosvil v. Brander* (a), in which the wife was mortgagee in fee, and the decision was against her, she being plaintiff, the Master of the Rolls, recognising the rule, says that "it might have been a matter of different consideration if the assignee had been Plaintiff in equity, and desired the aid thereof to strip the unfortunate widow of all that she had in the world, towards the doing of which equity would hardly have lent any assistance."

Many cases followed, in which the principle was recognised; and in *Burdon v. Dean* (b), the assignees of a bankrupt husband filed a bill, praying that they might be declared entitled, during the joint lives of the bankrupt and his wife, to the income of certain freehold, leasehold, and personal estates, to which the wife was entitled for life; upon which the Master of the Rolls said, "I have no objection to what they can get at law, but if they come into this Court, I will not extend the arm of the Court to give them any other part of her property, without a consideration for it. Therefore let it be referred to the Master, that they may lay proposals before him." It was said that the order in this case was by consent. That I think immaterial, as it does not affect the observation of the Master of the Rolls, for which alone the case is of any value.

In

(a) 1 P. Wms. 456.

(b) 2 Ves. jun. 607.

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In *Oswell v. Probert* (a), the husband having become bankrupt, Lord *Rosslyn* said, "Where persons claiming in right of the husband are obliged to come into an equitable jurisdiction, to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve." "Whatever the husband takes in right of his wife, is, in itself, a provision for the maintenance of both;" and in *Ball v. Montgomery* (b), the equity of the wife was put upon the same ground. In *Brown v. Clark* (c), Lord *Alvanley* said, the assignees of the husband "must make a provision for the wife before they can call it out of this Court." In *Freeman v. Parsley* (d), Lord *Rosslyn* directed a provision for a wife against the assignees of her husband, upon the same principle. In *Mitford v. Mitford* (e), Sir *W. Grant* said, "It is upon the ground that the assignees want its assistance to reduce the property into possession, that this Court imposes upon them the condition on which alone it would have assisted the husband to obtain possession." In *Wright v. Morley* (g), Sir *W. Grant* said, "In *Pryor v. Hill* (h) it was contended that the equity of the wife did not extend to the case of a life interest, upon the principle that the husband becomes absolute purchaser of that upon the marriage, in consequence of the obligation to maintain his wife thereby contracted. That argument, however, did not prevail." "The life interest passes to the assignees, subject to the ordinary equity for a settlement." In *Elliott v. Cordell* (i), Sir *J. Leach*, though he thought that the title of a particular assignee

(a) 2 *Ves. jun.* 680.; see p. 682.  
 (b) 4 *Bro. C. C.* 338.  
 (c) 3 *Ves. jun.* 166.; see p. 168.  
 (d) 3 *Ves. jun.* 421.; see p. 424.

(e) 9 *Ves.* 87.; see p. 101.  
 (g) 11 *Ves. jun.* 12.; see p. 21.  
 (h) 4 *Bro. C. C.* 139.  
 (i) 5 *Mad.* 149.

signee of the property of the wife then in dispute was good against her claim to maintenance out of it, yet said, that if the husband had been bankrupt, the Court would have fastened upon his assignee the obligation of maintaining the wife out of any property of hers; which must be understood to assume the case of the assignee's applying for the assistance of this Court to obtain such property.

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From these authorities, and many others which recognise the same principle, it appears that the equity which this Court administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party who seeks equity to do equity; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, equity, though it follows the law, and therefore gives to the husband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence: it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this Court, in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a Plaintiff; and if such be the principle, what difference can it make,



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make, where the assignees of the husband are applying to this Court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust estate. It happens, however, that in *Oswell v. Probert*, before referred to, the estate of the wife was the same as in this case. The testator had devised his estate to trustees in fee, upon trust to pay certain annuities and legacies, and the trustees were directed to stand seised to the use of his daughter, the wife of the bankrupt, for her life. The estate had, indeed, been sold to pay the prior charges, but it being evident that the trust was subsisting, and the legal estate in the trustee, the Court said, that the assignees were in the place of the husband not maintaining the wife, and declared that a provision was to be made for her.

Such being the principle of this Court, and such the authorities in favour of the wife, no case has been referred to in support of the decree.

It may be thought that the cases of *Walter v. Saunders* (a) and *Tudor v. Samyne* (b) are opposed to this rule. It is, however, to be observed, that in the former there had been a decree before the assignment of the husband; and that decree may have been for the payment to him. That part of the latter case which applies to the present is not easily explained, as it appears that although that case was so early as 1692, the rule of not assisting the husband to property of the wife, without making provision for the wife, was well known. It was, however, probably, founded upon the decision of Sir *Edward Turner's Case*,

(a) 1 *Eq. Ca. Ab.* 58.

(b) 2 *Vern.* 270. See a state-

ment of this case from Reg. Lib.

in 4 *Myne & Craig*, 589. note.

*Case (a)*, at which Lord *Nottingham*, in *Pitt v. Hunt* (*b*) expressed great surprise, in which Lord *Hardwicke*, in *Jewson v. Moulson* (*c*) seems to have joined, and in which case he says that the rule that the husband cannot come into this Court for the fortune of his wife, without making a provision for her in the first place, is, in equity, grounded upon natural justice.

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I have carefully examined the decisions upon this subject, and given them my best consideration, as I always think it right to do when I differ from the Judge whose decision I am called upon to review, not only from the respect justly due to such decision, but to afford to the parties, or rather to their advisers, the means of weighing the value of the judgment I feel called upon to pronounce; but I think it right to guard against the supposition which might be entertained, from my having so done, of my thinking this a case of difficulty or doubt. I did not feel any such difficulty or doubt at the time of the argument, and none has been suggested by the subsequent consideration I have given to the case.

I must reverse the decree of the Vice-Chancellor, and refer it to the Master to approve of a provision for the maintenance and support of Lady *Champneys* out of the income of the estate.

(a) 1 *Vern.* 7.  
(b) 1 *Vern.* 18.

(c) 2 *Atk.* 417.

1840.

April 28, 29.  
May 2.

## CLAPTON v. BULMER.

A testator directed that upon the death, without leaving issue, of his daughter, who was his sole next of kin, a certain fund should be assigned to the nearest of kin of his own family for ever.

Held, upon the construction of the will, that these words meant to describe some person or persons to be ascertained at the daughter's death, and not the person or persons who should be his own next of kin at the time of his own death.

THE facts of this case are reported in the tenth volume of Mr. *Simons' Reports*. (a)

The Defendant *Percival White* now appealed from the Vice-Chancellor's decree on further directions.

Mr. *Wigram*, Mr. *Piggott*, and Mr. *Humphry*, in support of the appeal.

Mr. *Jacob*, Mr. *Richards*, and Mr. *Keene*, for the Defendant, *Bulmer*, in support of the decree.

In addition to the cases cited before the Vice-Chancellor, the following authorities were referred to by the appellant's counsel: *Harland v. Trigg* (b), *Doe v. Joinville* (c), *Doe v. Fleming* (d), in all of which the word "family" was used, *Rayner v. Mowbray* (e), in which the word "related" was employed, and *Holloway v. Holloway* (g), *Bird v. Wood* (h), *Long v. Blackall*. (i)

May 2.

The LORD CHANCELLOR.

I was desirous, before I disposed of this case, of having an opportunity of examining the authorities on the subject, before I came to the result which appeared to me

(a) Page 426. *et seq.*

(b) 1 *Bro. C. C.* 142.

(c) 3 *East*, 172.

(d) 2 *C. M. & R.* 638.

(e) 3 *Bro. C. C.* 234.

(g) 5 *Ves.* 399.

(h) 2 *Sim. & Stu.* 400.

(i) 3 *Ves.* 486.

me to be the undoubted intention of the party. So many technical distinctions have been made, that I wished much to see how far they prohibited me from giving effect to what I had not the least doubt was the intention of the party.

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The testator, having one child, a daughter, gives certain legacies, and gives the residue to trustees, to apply the income, after certain annual payments, to the separate use of the daughter, which is guarded against being affected by any future coverture, and after her death it was to go to the children of the daughter. Then comes this proviso: " Provided always, and I do declare my will and mind to be that, in case my said daughter shall happen to die without leaving any issue, then I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, upon her decease without issue as aforesaid, raise and pay the sum of 3000*l.* to such person or persons as she, my said daughter, shall, in and by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, nominate, give, direct, or appoint; and in case my said wife shall happen to survive my said daughter, and my said daughter shall die without issue as aforesaid, then I will and direct that my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall also, upon the decease of my said daughter, and such failure of issue as aforesaid, raise and pay out of the said trust monies the further sum of 2000*l.* unto my said dear wife, to and for her own use and benefit; and I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall assign and transfer the residue of such trust monies and

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and of my personal estate unto *the nearest of kin of my own family* for ever."

The contest is between those who claim through the daughter, who was the testator's sole next of kin at his death, and the person who was next of kin of the testator at the death of the daughter, and is also the next of kin of the daughter. Those two characters being united in the same person, the only question is, whether the testator intended that his daughter, who was his sole next of kin at his own death, and to whom he had given a life interest and a power of disposition by will to the extent of 3000*l.*, should take by the description of the person to whom the residue, after deducting the 3000*l.*, is to be assigned.

Now, I should have had no doubt that the testator could not possibly intend his own daughter.

Many circumstances concur in the present case. The tenant for life is the sole next of kin of the testator; — is the person who is to appoint a portion of the residue, viz. 3000*l.*; and, referring to the period of the death of that tenant for life, the testator directs that, upon her decease without issue, his trustees shall "assign and transfer" the residue of his personal estate. Independently, however, of all these circumstances, there is a very strong description of the person who is to take — it being borne in mind that at his death she was his only child — the person to take is the nearest of kin of his own family for ever.

It appears to me that only two constructions can be put upon this description. It clearly implies a doubt as to who would be the party to take.

By

By the words "my own family," the testator may have meant to describe his daughter, or may have meant to describe his own immediate stock. In the one case, the gift would be to his own next of kin at his daughter's death, and, in the other case, it would be to the daughter's next of kin at the same period.

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It is quite immaterial to decide between those two classes, because they are, in fact, the same individual, and the only question, therefore, is, whether the persons intended by the testator are not persons to be ascertained at a future period.

I have looked through all the cases referred to; but there is no case in which such strong demonstration is to be found that the person who is to take is a person to be ascertained at a future period.

The result is, the appeal must be dismissed with costs.

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CONDUIT v. SOANE. (a)

Nov. 28.

*In re* JOSEPH GANDY, a supposed Lunatic.

**T**HIS was a petition of the wife and children of *Joseph Gandy*, and it prayed that a half year's payment then due, and the future payments of an annuity of 100*l.*, standing to the separate account of the lunatic in the above-mentioned cause, might be paid, by the Accountant-General, to the wife and son of the lunatic, An annuity of 100*l.* directed to be paid to the wife and son of a supposed lunatic, without reference to the Master.

and

(a) The reporters are indebted to Mr. *Cameron* for the note of this case.

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and the survivor of them, to be applied in the care and maintenance of the lunatic.

No commission had issued. It appeared that the lunatic was in his seventieth year, and that, with the exception of an annual allowance of 70*l.* made to his family by the Royal Academy of Fine Arts, the annuity was his only property.

Mr. *Cameron*, for the petitioners.

*The* LORD CHANCELLOR ordered, without a reference to the Master, that the payment then due and the future payments should be paid to the wife and son of the supposed lunatic, they undertaking to apply them for his benefit; but his Lordship refused to direct that the son should receive the annuity in the event of the wife dying before her husband. (*a*)

(*a*) See *Eyre v. Wake*, 4 *Ves.* 795.; *Ex parte Pickard*, 3 *Ves.* & *B.* 127.; *Ex parte Farrow*, 1 *Russ. & Mylne*, 112.

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CASBORNE v. BARSHAM and Others.

Jan. 25.  
March 21.

**T**HE bill in this cause impeached a deed which it alleged to have been fraudulently obtained by a solicitor from his client, and it prayed, amongst other things, that the deed might be delivered up to be cancelled, or that it might stand as a security only for what, if any thing, was really due from the client to his solicitor.

Issue ordered to be taken *pro confesso* against a party who was to be Plaintiff in the issue, and who had neglected to proceed to trial of it at the time appointed by the order by which the issue had been directed.

Upon the hearing of the cause, before the Master of the Rolls, on the 12th of *February* 1838, his Lordship made an order directing the trial of an issue whether the deed was obtained by fraud or undue influence; and in such issue the Plaintiff in this cause was to be Plaintiff at law. A trial having taken place, another order was afterwards made, dated the 26th of *June* 1839, by which it was directed that the parties should proceed to a new trial at law, at the next Spring assizes to be holden for the county of *Suffolk*, of the issue directed by the order made in the cause on the 12th of *February* 1838, viz. whether the deed was obtained by fraud or undue influence. Further directions and costs were reserved until after the new trial of the issue; with liberty to apply. It appeared (before the Lord Chancellor) that the intention of the Master of the Rolls had been that the new trial should take place at the ensuing Summer assizes, and that the reason why his Lordship's order, as finally drawn up, appointed the next Spring assizes as the time for the new trial, was, that the Plaintiff's solicitor had, on the 15th of *July*, applied for the postponement, in consequence of his having another cause to try elsewhere at the Summer assizes. The Defendants, however, not being satis-



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fied with this postponement of the new trial, applied to the Lord Chancellor to vary the Master of the Rolls' order, by directing that the trial should take place at the ensuing Summer assizes; and by an order of the Lord Chancellor on the 20th of *July* 1839, it was ordered that the order of the Master of the Rolls of the 26th of *June* should be varied, so far as it directed the new trial to be had at the next Spring assizes for the county of *Suffolk*; and it was ordered that the parties should proceed to such new trial at the then next assizes for the county of *Suffolk*.

The issue was not tried at the Summer assizes of the year 1839, for *Suffolk*; and in *Michaelmas* term, the Defendants gave notice of a motion, before the Master of the Rolls, that the issue might be taken *pro confesso* against the Plaintiff, and that the issue might be taken as tried, and a verdict had for the Defendants, and that the cause might be set down to be heard on further directions and costs, reserved by the order of the 26th of *June*.

Upon this motion being made, the Master of the Rolls, on the 4th of *December* 1839, ordered that the Plaintiff should proceed to the trial of the issue at the next Spring assizes for *Suffolk*, or in default thereof, that the issue should be taken *pro confesso* against him, and that he should pay to the Defendants the costs of the application.

From this order the Defendants now appealed, and moved, before the Lord Chancellor, that it might be discharged, except so far as it related to costs, and that the issue might be taken *pro confesso* against the Plaintiff.

It appeared, by the affidavit of Mr. *Thomas Henry Dixon*, the Defendants' *London* agent, sworn and filed  
 on

on the 19th of *November*, that on the 24th of *July* 1839, being the last day for giving notice of trial for the *Suffolk* Summer assizes, he applied to the Plaintiff's *London* agent to know whether he intended to give such notice, and that the answer given by the Plaintiff's agent to that application was, that as he had not received any instructions to deliver the notice of trial, he should not give it; but that on the following day (the 25th) the Plaintiff's agent wrote to the deponent in the following terms: — "I have just heard from the Plaintiff, and he says the question must rest where it is, from the known unfavourable impression of the Judge who will preside on the civil side at the assizes to be held at *Ipswich* on the 3d of next month."

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The deponent then stated a further correspondence between himself and the Plaintiff's *London* agent, from which it appeared that the deponent, on receiving the letter of the 25th of *July*, at once wrote to the Plaintiff's agent, saying that he concluded, from his letter, that he intended to abandon the issue, and that the Plaintiff's agent then wrote to him a note, in which he enclosed a copy of the Plaintiff's letter to his solicitor in the country of the 24th, being the letter referred to in his agent's letter of the 25th, before mentioned, but, at the same time, stated that the Plaintiff was quite ready to try the issue at the Spring assizes of the next year; and that the deponent then wrote to the Plaintiff's agent, on the 27th of *July*, saying that he understood, from the Plaintiff's letter, that he intended to give up proceeding any further with the issue; but begging that if that was not really the Plaintiff's intention, the Plaintiff might be informed that he, the deponent, on behalf of all the Defendants, decidedly objected to any postponement, and should oppose any attempt to proceed with the issue. after the approaching assizes at *Ipswich*,

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where he, the deponent, was ready to proceed, and required the Plaintiff to proceed to trial now, if at all; and that if he did not do so, he (the deponent) should consider that the Plaintiff had abandoned the issue. The letter then proceeded to request the Plaintiff's agent to write to the Plaintiff, that he might re-consider the subject, and avail himself of the opportunity to try the issue at the ensuing assizes, of which the writer stated he should expect to receive notice, not later than *Tuesday* morning then next, if the Plaintiff should alter his present determination.

The affidavit then stated that on the 2d of *November* the deponent received from the Plaintiff's agent a notice of trial for the next Spring assizes, which the deponent returned, with a note, saying that as the Lord Chancellor had varied the Master of the Rolls' order, by directing that the issue should be tried at the last assizes, there was now no order under which the trial of the issue could take place; and that, in reply to this note, the Plaintiff's agent wrote to him, saying that he should consider the notice as having been given, and should proceed to trial at the next assizes.

In answer to this affidavit, the Plaintiff's solicitor in the country, Mr. *Wing*, made an affidavit, explaining the reason why the action which he was to have tried elsewhere during the Summer assizes had, in fact, gone off; and the clerk of Mr. *Dawson*, the Plaintiff's *London* agent, made an affidavit, stating that the Lord Chancellor's order of the 20th of *July* was not passed and entered until the 14th of *August*.

It was upon these three affidavits that the order of the Master of the Rolls of the 4th of *December* was made, and that the appeal motion was now made.

Mr.

Mr. Cooper and Mr. Elderton, in support of the appeal motion.

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Mr. Richards and Mr. Bacon, *contrà*.

It was strongly contended that, by the practice of this Court and of the Court of Exchequer in Equity, the party who was to be Plaintiff in an issue was entitled to postpone the trial for one assizes, without the liability of having the issue taken *pro confesso* against him.

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The LORD CHANCELLOR (after stating the proceeding, anterior to the order of *June* 1839, proceeded as follows:)

March 21.

In *June* 1839 the Master of the Rolls directed a new trial of the issue, to take place at the then approaching Summer assizes; but, having been applied to to postpone the trial to the following Spring assizes, he ordered such postponement accordingly. On the 20th of *July*, an application was made to me to vary that order; and as I saw no reason why the trial should not take place at the then Summer assizes, I did vary the last mentioned order, by directing that the trial should take place at the then Summer assizes, viz. last Summer.

Those are the dates bringing down the transaction to the date of my order of the 20th of *July*.

A motion was afterwards made that the issue might be taken *pro confesso* against the party who was to be Plaintiff at law. Certain reasons are assigned for not having gone to trial, and are contained in three affidavits filed in *November*. The first affidavit is that of *Thomas Henry Dixon*. I am now confining myself to the affidavits made after *July*; for if the party has not stated reasonable ground for not going to trial, the con-

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sequences will be the same as if he had gone to trial and failed. He states that he prepared for going to trial accordingly, and that on the 24th of *July*—that is, four days after I had varied the Master of the Rolls' order — [His Lordship read the affidavit].

From this affidavit it appears that nothing further was received from the solicitor of the Plaintiff; and the next transaction was on the 2d of *November*. It is quite impossible not to see, from that affidavit, that the Plaintiff makes up his mind to take no further proceedings; — to make no further move.

Against this, two affidavits are filed on the other side. One is Mr. *Wing's*, which has no reference to the case at all. It is only intended to shew a reason why he could not conveniently attend. Mr. *Dixon's* affidavit is not touched by any statement made by Mr. *Wing*; but there is an affidavit of a clerk to Mr. *Dawson*, the *London* agent for the Plaintiff, who says that the order was not passed and entered till the 14th of *August*. That affidavit appears to me quite as immaterial as the former. It was the business of the party who was to try the issue to draw up the order; and the commission day was not till the 3d of *August*. So far from there not being time to prepare for the trial, the Plaintiff actually gives no notice of trial, but a notice that he does not intend to proceed to trial; but for that he gives no reason whatever, except that he does not like the Judge before whom the trial would take place.

The party is ordered to proceed to trial at a particular assizes; and it is to be recollected that it is a new trial. He not only does not do so, but he contends that he has, as a matter of course, a right to go to trial at an ensuing assizes; no reason which the Court  
 can

can possibly recognise being stated for his not having gone to trial at the assizes at which the trial was ordered to take place; and as to his choosing the Judge before whom the issue shall be tried, that is, of course, impossible.

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The Court being asked, in the month of *June*, to give the party an opportunity of proving his case, gives him an opportunity of doing so at the then next Summer assizes, and, except so far as altered by the Master of the Rolls' order made five days before mine, so the matter had stood ever since *June*. The assizes having passed without the issue being tried, the party with whom the trial was to take place comes to the Court, asking it to give effect to the order which directed the trial, by ordering, now, that the issue which the other party was to have tried, and which he has failed to try, may be taken *pro confesso* against him. No pretence whatever is assigned, and no apology made for not having gone to trial according to the order of the Court; but the question of right is contended for — the right, under an order for trial at one time, to proceed to trial at another. Now, that is a very startling proposition, and it is very important to ascertain whether there is any authority for it; for if that could be done which is contended for here, it would seem that a party might, in any case, disobey the order of the Court; it having been the matter — and the only matter — in dispute here, and at the Rolls before, whether the trial should take place at the time prescribed in my order, or at the subsequent period; and all that discussion would have been useless, if the party had the discretion which has been contended for. I wished, therefore, to ascertain whether there was any foundation for such a proposition; and, accordingly, Mr. *Colville* was to search for all cases on the subject which

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are not in print, and I have examined all the cases which are in print.

The first case, in point of date, is of the year 1701, *Roby v. Handley*, of which Mr. Colville has furnished me with the following note. (a) “*Roby v. Handley*, before Lord Keeper Wright, 21st of February, 170 $\frac{1}{2}$  Lib. B. 159. At the hearing of the cause, issue directed, with this addition, ‘that if the Plaintiff failed to go to trial at the then next assizes, the verdict should be taken against him *pro confesso*.’ The Plaintiff did go to trial, the verdict was against him, and the bill was then dismissed.” There, at least, no second opportunity was given.

The next case is *Jeneway v. Downing*, 1746, in which an order was made for taking the issue *pro confesso*; and there no second opportunity was given. (b) Then comes *Wilson v. Ginger*, 1776, the decree having been in July 1775. No time was given there. (c) The next

was

(a) The Lord Chancellor stated the case from MS., and read an order for taking the issue *pro confesso*.

(b) This order is to be found in *Reg. Lib. A.* 1746, fol. 14., and appears to have been made upon affidavit of service, by Barons Clarke, Holford, Sawyer, and Montague.

(c) See a note of this case, 2 *Dick.* 521. The following copy of the order was furnished to the Lord Chancellor by Mr. Colville.

“Monday the 19th day of February, in the sixteenth year of the reign of his Majesty King George the Third, 1776. Be-

tween Susan Wilson, Plaintiff; William Ginger, Richard Ginger, and others, Defendants. Upon opening of the matter this present day unto the Right Honorable the Lord High Chancellor of Great Britain, by Mr. Attorney-General, being of the Plaintiff’s counsel, it was alleged that this cause, on the 27th day of July last, came on to be heard, when it was (amongst other things) ordered that the parties should proceed to a tryal at law at the next Lent assizes to be holden for the county of Hertford, on the following issue, *devisavit vel non*, on the paper writing dated the 10th day of August

1768,

was in 1819, *Anon.* (a) There the opposite party, by his application, gave the Plaintiff in the issue another opportunity of trial. All that the opposite party asked was, that the Plaintiff in the issue might go to trial at the next assizes, or otherwise that the issue might be taken *pro confesso*. The next case is in 1820, *Bearblock v. Tyler* (b), where it was said to be the practice of the Court of Exchequer to allow the Plaintiff in the issue to make default at one assizes. Sir *Thomas Plumer*, than whom no man could be better acquainted with the practice of the Exchequer, does not seem to acquiesce

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1768, purporting to be the will of *Clerke Wilshaw*, deceased, and on a paper writing dated the 29th day of *August* 1770, purporting to be a second codicil to the said will; and the Plaintiff here was to be Plaintiff at law, and the Defendants *William Ginger* and *Richard Ginger* were to be Defendants at law, who were forthwith to name an attorney, accept a declaration, appear and plead to issue; and it was further ordered that it should be referred to Mr. *Harris*, one of the Masters of this Court, to settle the issue in case the parties should differ about the same: That the said Master, on the 15th day of *February* instant, made his certificate, and thereby certified that he had settled a draught of the said issue, but that the Defendants *William Ginger* and *Richard Ginger* had not named an attorney, although duly summoned so to do, and therefore it was prayed that the Defendants *William Ginger*

and *Richard Ginger* may forthwith name an attorney in order for the tryal of the said issue, and that the said issue may be tryed at the next assizes to be held for the county of *Hertford*, or that the said issue may be taken *pro confesso*. Whereupon, and upon hearing the said Master's certificate, dated the 15th day of *February* instant, an affidavit of *John Gibson*, and an affidavit of notice of this motion read, His Lordship doth order that the Defendants *William Ginger* and *Richard Ginger*, do, in four days after notice hereof, name an attorney according to the said order on hearing, and consent to the tryal of the said issue at the next assizes to be holden for the county of *Hertford*, or in default thereof that the said issue be taken *pro confesso* against the said Defendants."

(a) 4 *Mad.* 255.

(b) 1 *J. & W.* 225.



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acquiesce in that, though he recollects the case in which such a rule was supposed to have been acted on. He says, "I remember that case, and your statement of it is very correct; but I do not think there is such a rule here: it must not be understood that when the Court directs the trial to be at the next assizes, that still the Plaintiff at law shall have such command over his issue, that he may try it or not as he pleases." Now, sitting as a Judge in the Court of Chancery, I am not bound by the practice of the Court of Exchequer, but if there were such a practice in the Exchequer, as was asserted in the case to which I have just referred, the suitors of this Court have had notice, ever since the year 1820, that they must not consider such to be the practice of this Court.

The next case, *Sackett v. Bassett* (a), in 1823, is not very material. The next is *Powell v. Wood* (b), in 1880. It would appear from the report that a considerable interval had there elapsed before the trial had taken place. (c) The next case was *Owen v. Price*, in 1831. There the party, who was to be the defendant in the issue moved, and the circumstances were precisely the same as in the *Anonymous case* in the 4th *Maddock*. There was no adjudication of the Court on the subject of the practice, because the nature of the application did not call for it.

There is, therefore, not only no authority to support the proposition which has been contended for in the present case, but all the authorities are the other way; and

(a) *Reg. Lib.* B. 1822, fo. 543.

(b) 1 *Russ. & Mylne*, 354.

(c) Mr. *Collis*, one of the Registrars, informed the Lord Chancellor that it appeared by

the Registrar's Term Book that the order in this case was never drawn up; and this statement was confirmed by Mr. *Colville*.

and there is a distinct authority that the practice said to prevail in the Court of Exchequer is not to be considered the practice here. Whether that is the practice in the Exchequer or not, the practice of the Exchequer is no guide for the practice of this Court; but I think it is due to the Court of Exchequer not to have it supposed that there is any such practice in that Court.

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Two authorities are referred to for the purpose of shewing what is the practice in the Court of Exchequer; the first is *Fowler's Practice*, vol. ii. p. 232., and the other is *Willis v. Farrer*. (a) Now Mr. *Fowler* states the practice thus: "But as it sometimes happens that the plaintiff in the issue cannot proceed to a trial at the time directed by the Court, the adverse party may, upon notice, in the following term after the issue ought to have been tried, move that the issue may be taken *pro confesso*. For the first default, however, and where a reasonable ground can be laid before the Court to shew that the issue could not be tried, the Court will not suffer it to be taken *pro confesso*, but will rather put terms upon the party peremptorily to try it at the next sittings or assizes, or, in default thereof, that the issue shall be taken *pro confesso*; and in case the plaintiff in the issue does not proceed to trial accordingly, then the adverse party may set down the cause for further directions, and to have the issue taken *pro confesso*." Nobody can dispute the propriety of that practice. It is the practice here and everywhere. If the party can shew reasonable ground that the issue could not be tried at the time that the Court ordered it, the Court would not take it *pro confesso*. The practice stated by *Fowler* is directly contrary to what it is cited to prove, namely,

a) 3 *Yo. & Jerv.* 381.

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namely, that the party may act just as he pleases, either with or without any reason.

*Willis v. Farrer* not only does not recognise any such practice as that contended for, but affords a strong inference that the practice is not so; for it was an application to postpone the trial of an issue; and, in refusing the application, two of the four Judges warned the party who was to be the Plaintiff in the issue of the danger which would result from his not proceeding to trial at the time appointed.

Such being the state of the authorities, it is clear that no authority exists which could have misled the party who was to try the issue in the present case. Indeed, he does not say that he was misled. He does not urge that he had been so advised by counsel, or that there was any doubt upon the practice; and there is a total absence of any excuse or apology on his part.

Under these circumstances, unless I am to lay down the rule, now, for the first time, that a party has his choice whether he will try the issue at the time appointed or not, the issue must be taken *pro confesso* against him. No reason being alleged, the necessary consequence is, that I must consider him as having abandoned the issue.

I think, therefore, that the order of the Master of the Rolls must be varied, and that the issue must be taken *pro confesso*.

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June 21, 22.  
Nov. 26.

BETWEEN

ELIZABETH WATSON and EMMA WATSON  
an Infant, by the said ELIZABETH WATSON  
her Mother, and next Friend - - Plaintiffs.

AND

SAMUEL HAYES, RICHARD CAMPBELL  
BAZETT, JAMES HERRIOT, AUGUSTUS  
REYNARD, and MARGARET his Wife  
Defendants.

AND BETWEEN

The same Plaintiffs.

AND

AUGUSTUS REYNARD, and WILLIAM  
YOUNG BAZETT - - Defendants.

By Original and amended Bill, and Bill of Revivor and  
Supplement.

**T**HE will of *Joseph Watson*, the testator in this cause, dated the 15th of *March* 1820, was in the following terms: — “I give and bequeath to *Mary Dorothy Watson* my present wife, and *Richard Charles Bassett*, of *Sewardstone*, in *Essex*, merchant, all my estates and effects whatsoever and wheresoever, not otherwise disposed of by this my last will and testament; in trust to and for the purposes hereinafter mentioned. First, I give and bequeath to my loving wife *Mary Dorothy*, all my plate, linen, china, and furniture, of what kind or nature Estates devised to executors, upon trust for the purposes after mentioned. The testator proceeded to direct a sale of the estates, and the division of the produce among his five children, after first reserving a sufficient capital, the interest arising from which, should be sufficient to pay an annuity of 400*l.*, to his wife for her life; but he did not declare any trust, at the wife's death, of the sum to be so reserved. Held, a resulting trust for the heir.

Direction to executors to apply 25*l.* per annum for the maintenance of testator's natural daughter till twenty-one or marriage, which should first happen, when his executors were thereby required to pay to her 500*l.* She died under twenty-one and unmarried. Held, that the legacy failed.

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nature soever; I also give and bequeath to my said wife, the house, garden, and appurtenances belonging to me at *Somers Town*, in the county of *Middlesex*, now in the occupation of *Groom* merchant, for and during the term of her natural life; and it is my will and mind, that after her decease, the same shall be sold, and the money arising from the sale thereof, to be divided equally among my children then living, or the children of such as shall have died after attaining the age of twenty-one years. I also will and desire, that all my other estates of what nature or kind soever, or wheresoever situated, be sold, at the discretion of my executors hereinafter mentioned, and the money arising from the sale thereof, be vested in real or government security to be disposed of in manner following, (that is to say) that my executors shall pay, or cause to be paid, the sum of 25*l.* yearly and every year, by equal and quarterly payments, for the maintenance and education of *Sophia*, my natural daughter, by *Sarah Leeson*, late of the parish of *Pancras*, in the county of *Middlesex*, until she shall have attained the age of twenty-one years, or day of marriage, which shall first happen, when my said executors are hereby required to pay to *Sophia* the clear sum of 500*l.*, to and for her own sole use and benefit. I further give and bequeath to my said wife *Mary Dorothy*, a clear annuity of 400*l.* per annum, to be paid out of the interest arising from the money produced from the sale of my real estates aforesaid, to be paid quarterly, clear of all deductions whatsoever, for and during the term of her natural life; and I further direct, that the remaining sums arising from the said interest of monies directed to be vested as aforesaid, be appropriated to the maintenance and education of all my children by my said wife, share and share alike, until they attain the age of twenty-one years; when it is my will that they shall respectively receive

receive the principal or one fifth part of such sum as may remain, after first reserving a sufficient capital, the interest arising from which shall be sufficient to pay the above annuity of 400*l.* to my said wife, and my legacy to my said natural child, and also deducting the sum of 500*l.*, to be vested in real or government securities, for the sole use and benefit of *James Herriot*, now apprentice to Messrs. *Williams and Froward*, chemists and druggists in *London*, if he should attain the age of twenty-one years; and should he die before that time, my will and mind is, that the said sum of 500*l.* should be paid to his mother *Margaret Chrigton Herriot* of *Kingston, Jamaica*. I hereby further appoint my said wife *Mary Dorothy*, and my aforesaid friend *Richard Charles Bassett* joint executors to this my will and testament, and guardians to my said children."

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The testator died shortly after the date of his will, which was subsequently proved by his widow alone. He left five children, viz.: *Joseph Watson* his eldest son, and heir-at-law, who attained twenty-one and died intestate, leaving the adult Plaintiff his widow and the infant Plaintiff his only child and heiress-at-law; *Edward Watson*, who attained twenty-one, and afterwards died; *Milbrough Watson*, and *Anna Watson*, who respectively died under age; and *Margaret Watson*, who attained twenty-one, and married the Defendant *Augustus Reynard*, and was made a Defendant with him in this suit, but died before the suit was brought to a termination. The adult Plaintiff became the legal personal representative of her husband, *Joseph Watson* the son, and of *Milbrough Watson*, and *Anna Watson*: the Defendant *Herriot* became the legal personal representative of *Edward Watson*; and the Defendant *Augustus Reynard* became the legal personal representative of his deceased wife *Margaret*.

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The testator's widow died in the year 1831, and the Defendant *Hayes* became her executor. After her death, the will of the testator was proved by the testator's executor *Richard Campbell Bazett*, (in the will called *Richard Charles Bassett*), who afterwards died, and the Defendant *William Young Bazett* became his executor, and also the legal personal representative of the testator.

*Sophia Leeson*, the testator's natural child, mentioned in his will, survived the testator, but died at the age of eight years.

The suit was instituted for the administration of the testator's estate.

By the decretal order on further directions, made by the Vice-Chancellor, it was, amongst other things, declared, that the testator died intestate, as to so much of the produce of the sale of his real estate as would have been requisite to answer the annual sum of 400*l.*, bequeathed to his widow, if the freehold estate had been sold in her lifetime, as directed by the testator, and that, upon the death of the widow, the adult Plaintiff, as the personal representative of the testator's heir-at-law, became entitled to receive such part of the produce of the sale as ought to have been set apart to answer such annuity; and it was also declared, that the legacy of 500*l.* bequeathed to *Sophia Leeson*, vested in her upon the death of the testator; and it was referred to the Master to compute interest at the rate of 4 per cent. per annum upon that legacy from the day of *Sophia Leeson*'s death. (a)

From these declarations, and the directions consequential upon them, contained in the decretal order on further

(a) See 9 *Sim.* 500., where the case is reported on the second point.

further directions, the Defendant *Augustus Reynard* now appealed, insisting that it ought to be declared, that the capital directed to be reserved to answer the annuity of 400*L.*, became payable to such of the testator's children by his wife as attained the age of twenty-one years; and that it ought also to be declared, that the legacy to *Sophia Leeson* lapsed by her death under the age of twenty-one years.

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Mr. *Wigram* and Mr. *Bethell*, in support of the appeal, cited, with reference to the first point, *Hutcheson v. Hammond* (a), *Gibson v. Lord Montfort* (b), *Genery v. Fitzgerald* (c), *Ackers v. Phipps* (d); and with reference to the vesting of the 500*L.* legacy, the cases of *Leake v. Robinson* (e), *May v. Wood* (g), *Pulsford v. Hunter* (h), *Batsford v. Kebbell* (i), *Hanson v. Graham* (k), *Billingsley v. Willis* (l), *Vawdry v. Geddes* (m), *Breedon v. Breedon* (n), *Prowse v. Abingdon* (o), *Gawler v. Standerwick* (p), and *Roper on Legacies*. (q)

Mr. *Girdlestone*, Mr. *Piggott*, and Mr. *T. Turner*, for the Plaintiffs, cited, upon the first point, *Cruse v. Barley* (r), *Jones v. Mitchell* (s), *Amphlett v. Parke* (t), *Green v. Jackson* (u), *Gibbs v. Rumsey* (x), *Collins v. Wakeman*. (y) Upon the second point, they said their case was the same as that of the appellant.

Mr.

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| (a) 3 Bro. C. C. 128.       | (n) <i>Ib.</i> 413.                         |
| (b) 1 Ves. sen. 485.        | (o) 1 Atk. 482.                             |
| (c) <i>Jacob</i> , 468.     | (p) 2 Cox, 15.                              |
| (d) 9 Bligh., 430.          | (q) Vol. 1. p. 475. <i>et seq.</i> (3d ed.) |
| (e) 2 Meriv. 363., see 386. | (r) 3 P. W. 19.                             |
| (g) 3 Bro. C. C. 471.       | (s) 1 Sim. & St. 290.                       |
| (h) <i>Ib.</i> 416.         | (t) 2 Russ. & Myl. 221.                     |
| (i) 3 Ves. jun. 565.        | (u) <i>Ib.</i> 258.                         |
| (k) 6 Ves. jun. 239.        | (x) 2 F. & B. 294.                          |
| (l) 3 Atk. 219.             | (y) 2 Ves. jun. 683.                        |
| (m) 1 Russ. & Myl. 203.     |   |



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Mr. *Martin*, for the Defendant *Herriot*.

Mr. *Wray*, for the Attorney-General on behalf of the Crown, as entitled to take out administration to the natural child, referred to *Ram on Assets* (a), and *Love v. L'Estrange*. (b)

Mr. *Chandless*, for the Defendant *Hayes*.

Mr. *Purvis*, for the Defendant *W. Y. Baxett*.

Mr. *Wigram*, in reply.

Nov. 26.

*The* LORD CHANCELLOR.

The first question is as to the sum directed by the testator to be invested to provide for the 400*l.* per annum, given to his wife.

The testator directs an annuity of 400*l.* to be paid to his wife, out of the interest arising from the money produced from the sale of his real estate. He then gives the remaining sums arising from the interest of monies directed to be vested as aforesaid, to be appropriated to the maintenance and education of his children till they attain twenty-one, "when it is my will, that they respectively receive the principal, or one-fifth part of such sum as may remain, after first reserving a sufficient capital, the interest arising from which shall be sufficient to pay the above annuity of 400*l.* to my wife, and my legacy to my natural child," which was 500*l.*, and also deducting the sum of 500*l.*, which he gives absolutely to other persons.

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(a) p. 154. *et seq.* 2d ed.

(b) 5 *Bro. Parl. Ca.* 59.

The sum necessary to be invested to produce the annuity of 400*l.*, is to be part of the proceeds of the real estates; and the question is, whether such sum is included, subject to the payment of 400*l.* per annum, in the gift to the children, for, if not, it clearly belongs to the heir. The gift to the children at twenty-one is of the principal, that is, the principal producing the income before directed to be applied to their maintenance and education, which principal would, upon their so attaining twenty-one, be disposable; whereas the principal invested to produce the 400*l.* for the wife would not be affected by the children attaining twenty-one, and might not be at that time disposable. The testator also explains what he means by this gift of the principal; for he says that each child, there being five, was to have one-fifth part of such sum as might remain, after first reserving sufficient capital, the interest arising from which should be sufficient to pay the above annuity of 400*l.* to his wife, and his legacy to his natural daughter, and another legacy of 500*l.* He does not give the fund, or the residue of the fund, subject to the annuity of 400*l.*, but such fund as should remain, after reserving a sufficient capital to produce that annuity. There are no words of gift, except of so much as should remain of the fund after these deductions;—none of the capital producing the 400*l.* so to be deducted. The result of these directions is, that from the gross fund sufficient shall be taken and invested to produce the 400*l.* per annum, and what shall remain of such gross fund, after this and the other deductions, shall be divided amongst his children at twenty-one.

I do not find any gift of the capital directed to be invested for the purpose of producing this 400*l.* per annum, and I therefore agree with the Vice-Chancellor

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in thinking, that, upon the death of the widow, the heir-at-law becomes entitled to it.

As to the 500*l.* legacy to his natural daughter, the decree has declared it to be a vested legacy in such daughter from the time of the testator's death, and that interest is to be paid thereon at the rate of 4*l.* per cent. from her death, she having died at the age of eight years.

The directions in the will are, after devising his estate to trustees, that all his other estates of what nature or kind soever, and wheresoever situate, be sold, and the money arising from the sale thereof be vested in real or government securities, to be disposed of as follows; — that his executors should pay 25*l.* per annum for the maintenance and education of his natural daughter *Sophia*, till she should attain twenty-one or be married, “*when* my said executors are hereby required to pay to *Sophia* the clear sum of 500*l.*, to and for her own sole use and benefit.” It does not appear from so much of the report as is set out in the petition of appeal, whether this 500*l.* is to be considered as payable out of the personal or real estate; but, as most favourable to the vesting, I will suppose, that there was personalty sufficient for that purpose; and in order to try the question of vesting, I will first consider the gift of the 500*l.* independently of the gift of 25*l.* per annum for maintenance, and secondly, how far that provision affects the question of vesting.

There is no gift of the 500*l.*, except in the direction to the executors to pay that sum to the daughter, when she shall attain twenty-one or be married. Here is the word “*when*” distinctly applied to the gift itself,  
and

and not to the time of payment, to which Sir *W. Grant's* judgment in *Hanson v. Graham* (a) is therefore directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a given time which never arrived, or upon a given event which never took place, to which Sir *W. Grant's* observations in *Leake v. Robinson* (b) directly apply, and which doctrine has been frequently recognized as a settled rule.

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This case appears to me to come so clearly within those rules, that I cannot think that any doubt would have been entertained as to this legacy having failed by the death of the legatee in infancy, if the question had not been supposed to be affected by the gift of the 25*l.* per annum, for its maintenance and education.

It is well known, that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which effects the vesting of the legacy. Such was the opinion of Sir *W. Grant* in *Hanson v. Graham* and *Leake v. Robinson*, and recognized by Sir *J. Leach* in *Vawdry v. Geddes*. (c) It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy.

In

(a) 6 *Ves.* 239.

(b) 2 *Mer.* 565., see p. 587.

(c) 1 *Russ. & Mylne*, 205.,  
see p. 208.

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In this case, 25*l.* per annum, out of the proceeds of the real and personal estate, after investment in real or government securities, is directed to be paid quarterly for the maintenance and education of the daughter till twenty-one or marriage, when the 500*l.* is to be paid. That the testator fixed upon the sum of 25*l.* per annum as interest at 5*l.* per cent. upon 500*l.* is probable, but it is clearly not given as interest upon that sum. The gifts are perfectly distinct, and the title to the 25*l.* per annum could not be affected by the interest upon 500*l.* not amounting to 25*l.* In *Batsford v. Kebbell* (a), Lord *Roslyn*, there being no gift, except in the direction to pay at a certain age, held the legacy not vested before that time, although the legacy was of 500*l.* 3*l.* per cents., and there was a direction to pay the dividends upon 500*l.* 3*l.* per cents. to the legatee, until he should attain the age at which the stock was to be transferred to him. That case necessarily includes and governs that now before me.

I am, therefore, of opinion, that this gift of 25*l.* per annum cannot be considered as interest upon the 500*l.* so as to effect the vesting of the legacy, and consequently, that even supposing the legacy to have been payable out of the personal estate, it failed by the death of the legatee under twenty-one and unmarried; but if, as seems probable from the language of the will, the legacy, if payable, would have been to be raised out of the real estate, no ground would remain upon which any argument could be rested in favour of the vesting.

The decree of the Vice-Chancellor must, therefore, be varied, by declaring that this legacy of 500*l.* lapsed by the death of the legatee under twenty-one and unmarried.

What

(a) 3 *Ves.* 365.

What the effect of this decision will be upon the interest of the parties, that is, who will be entitled to the amount of this lapsed legacy, cannot, I conceive, be decided in the present state of the cause, it being as yet unascertained whether it ought to be considered as money or land. Probably, however, the parties do not intend to raise any such question, as I find, by my note, that the counsel for the Plaintiff stated, that, as to the 500*l.*, the Plaintiff's case was the same as that of the Appellant; whereas, if the 500*l.* was to arise from the land, the Plaintiff *Eliza Watson*, as personal representative of the heir-at-law, or *Emma*, her only child, would be the parties to contest with the Appellant, whether the 500*l.* lapsed to the heir-at-law, or passed under the residuary clause; and as the Plaintiff represents three-fifths of the residuary legatees, the value of the question must be very small.

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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

40.

IN THE

HIGH COURT OF CHANCERY.

BETWEEN

CHARLES WORTERS BROUGHTON and  
EDWIN PATRICK BROUGHTON, Plaintiffs;

AND

CHARLES LASHMAR and CAROLINE JANE  
BOWDITCH - - Defendants.

Bill dismissed  
without costs,  
upon motion,  
having been  
filed under a  
mistake, under  
which both  
Plaintiffs and  
Defendants  
were at the  
time.

THIS suit was instituted by the Plaintiffs, as administrators, together with their sister the Defendant Mrs. Bowditch, of Miss Mary Elizabeth Vigurs Broughton, who was supposed to have died intestate, for the purpose of obtaining from the Defendant Lashmar certain funds of which he had been a trustee for her. The bill alleged that Lashmar was about to leave the kingdom, and prayed that a writ of *ne exeat regno* might be issued against him; and such a writ was, upon motion, issued, accordingly. Lashmar, subsequently, viz. on the 15th of July 1839, moved to discharge the writ;  
and

and, upon that motion, an order was made, for the discharge of the writ, upon the terms of his paying into Court, in the cause, the sum of 2000*l.* (a)

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After this sum had been paid in, the Defendant *Lashmar* propounded in the Prerogative Court of *Canterbury* (by which the letters of administration had been previously granted) an unattested will of Miss *Broughton*, dated the 29th of *July* 1837, which was alleged to have been discovered (b) by the Defendant Mrs. *Bowditch*, and by which Miss *Broughton* gave all her property to the Defendant *Lashmar*.

Upon the Plaintiffs being satisfied of the authenticity of this will, they withdrew, in concurrence with Mrs. *Bowditch*, the letters of administration which had been previously granted as upon an intestacy; and administration with the will annexed was, thereupon, granted to *Lashmar*.

On the 26th of *August* 1839, very shortly after the Plaintiffs received notice of the discovery of the will, their solicitor wrote to the solicitors of the Defendants, (both Defendants being represented by the same professional firm), in the following terms:—“ I think it right to apprise you that it is not the wish of the Plaintiffs that the Defendants should answer the bill in this cause until you hear further from me on the subject.”

The

(a) “ Ordered, that the Defendant *Charles Lashmar* be at liberty to pay the sum of 2000*l.* into the Bank, with the privy of the Accountant General of this Court, to be there placed to the credit of this cause, subject to the further order of this Court; and thereupon it is ordered that the said writ *ne exeat*

*regno* be discharged, and that the said Defendant *Charles Lashmar* be discharged out of the custody of the said sheriff, as to the said writ; but this order is to be without prejudice to any question in this cause.”

(b) It was stated at the bar (see *post*) that this will was discovered on the 19th of *July* 1839.



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The answer of the Defendants' solicitors, on the 27th of *August*, was as follows:—"In answer to yours of the 26th instant, we have to request you will consent to dismiss the bill, and allow the funds now in Court to be paid out to Mr. *Lashmar*. Unless this is done, we must of necessity file the answers, in order to entitle the Defendants to move to dismiss."

On the 15th of *October* 1839, the Plaintiffs' solicitor wrote to the solicitors of the Defendants, in the following terms:—"I have instructed Messrs. *Jennings* and *Coxe* to withdraw all opposition to your client taking administration with the will annexed of the 29th of *July* 1837. I shall be obliged by your allowing me to inspect the letter of even date with that will, addressed by the late Miss *Broughton* to Mr. *Lashmar*, and set out in the joint affidavit of the latter and Mrs. *Bowditch* used in this cause. Upon Mr. *Lashmar* completing his title as administrator, and upon my being satisfied that the letter is genuine, I shall be prepared to make the following proposition;—that this bill be dismissed, upon terms that the costs of all parties, as between solicitor and client, be paid out of the fund in Court, and that, after payment of the costs, the balance be paid to Mr. *Lashmar*."

To this the Defendants' solicitors answered, on the following day, that they would not consent to the bill being dismissed on any other terms than with costs.

On the 20th of *November* 1839, the Defendants, although neither of them had been served with a *subpoena* to answer the bill, put in separate answers.

On the 4th of *December*, the Plaintiffs' solicitor wrote thus to the solicitors of the Defendants:—"In order  
 to

to put an end to this cause, and without prejudice to the Plaintiffs, in the event of your not accepting the offer, I beg to make this proposition ; —that the bill in this cause be dismissed, and that each party pay his and her own costs, and, upon such terms, that the 2000*l.* in Court be paid out to the Defendant *Lashmar*."

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No answer to this letter was sent, except that one of the firm of the Defendants' solicitors, upon meeting the Plaintiffs' solicitor in the street, told him that the proposition might be considered as declined.

On the 16th of *January* 1840 the Plaintiffs, by special leave of the Lord Chancellor, moved, before his Lordship, that the costs of suit of the Plaintiffs, as between solicitor and client, or between party and party, as the Court might think fit, might be taxed, and paid out of the fund in Court standing to the credit of the cause; and that the residue of such fund, or the whole thereof, if the Court should be of opinion that the Defendant *Lashmar* was entitled to the whole, might be transferred and paid to the Defendant *Lashmar*, and that, either on payment of such costs, or otherwise, as the Court should think fit, the Plaintiffs' bill might be dismissed; and that if the Court should think the Plaintiffs not entitled to costs, then that the bill might be dismissed without costs; and that such, if any, provision as the Court might think fit, either out of the fund in Court or otherwise, might be made for the costs of the Defendant *Mrs. Bowditch*, and that all proceedings in this suit, except for the purposes of the present motion, might be stayed.

Neither the correspondence, nor the order of the 15th of *July* 1839, was before the Court on this occasion.

Mr.

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Mr. *Richards* and Mr. *Lloyd*, in support of the motion, referred to the case of *Knox v. Brown* (a) before Lord *Thurlow*, in which a Plaintiff had been allowed to dismiss his bill without costs: and to the case of *Vansandau v. Moore* (b), in which Lord *Eldon* had fully admitted the power of the Court to dismiss a bill, without costs, upon the application of the Plaintiff: and to the cases of *Lynn v. Beaver* (c) and *Windham v. Graham* (d), in which costs had been ordered to be paid out of the fund although the bill was dismissed. (e)

Mr. *Wigram*, and Mr. *James Russell*, for the Defendant *Lashmar*.

The present case is not at all like those which have been referred to; and the Plaintiffs' mistake, in supposing that there had been an intestacy, affords no reason for depriving the Defendant *Lashmar* of his right to the costs of the suit. The will was discovered as long ago as the 19th of *July*, and yet the suit is still continued.

[*The LORD CHANCELLOR.* You cannot ask for any costs after the 19th of *July*, Mr. *Richards*.]

The fact that a Plaintiff has been under a mistake as to his rights never deprives the Defendant of his costs; and the circumstance that the Plaintiffs had clothed themselves and their sister with the character of administrators makes no difference; for their obtaining the letters of administration was only following up the original mistake.

The

(a) 1 *Cox*, 359.

(b) 1 *Russ.* 441., see 469.

(c) *Turner & Russ.* 63.

(d) 1 *Russ.* 331., see 347.

(e) See on the last point a recent case of *Thomason v. Moses*, 5 *Beav.* 77.

The Court will not, in such a case as the present, allow the Plaintiffs to dismiss their bill, except upon the usual terms of paying the Defendant's costs ; but, at all events, the Court has no authority, upon dismissing a bill, to make the Defendant *Lashmar* pay the Plaintiffs' costs, which is what the Court would do, in this case, if it ordered the costs to be paid out of the fund in court, that being, in truth, the Defendant *Lashmar's* fund. The fund has been paid into court without prejudice, and, therefore, it is not a fund out of which the Plaintiffs' costs can be ordered to be paid.

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*The* LORD CHANCELLOR.

So far as the *power* of the Court to dispose of the cause, upon motion, without costs, is concerned, I shall not think of disturbing it, after those decisions of Lord *Thurlow* and Lord *Eldon*, because there are many cases in which the cause is carried on to a hearing solely for costs ; and such an order may prevent that taking place. The money, however, appears to have been paid into court without prejudice, and it seems to me extremely important to ascertain what the order for payment was.

If the fund was in the hands of the administrators, the personal representatives, then I should not take away the fund without paying them their expenses. If it was paid into court by them, then I think I should consider it in their hands ; but, if paid in by the Defendant, then as in the hands of the Defendant. I must have that order produced.

But it appears to me doubtful, whether this is the right mode of obtaining the object. You ask that the residue of the money should be paid to the Defendant ; but I am not sure that I could do that, under these circumstances, upon motion, if it be his fund. It

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appears to me that the best mode would be to order that the fund should not be paid out without further notice, and then that either party should apply to the Court.

I think it is quite competent to the Court to dismiss the bill without costs. It is doubtful whether the Court can, upon such an application, deal with the fund, but the Court can make an order to stay all further proceedings. The order may be, that all further proceedings be stayed, with liberty to the Defendant *Lashmar* to apply.

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Mr. *Wigram* then asked for the costs of the motion.

The LORD CHANCELLOR declined to give them, observing that he thought the Plaintiffs were entitled to make the application.

Mr. *Richards* then asked that the bill might be dismissed.

The LORD CHANCELLOR.

No. There must be another application for the fund; and, therefore, it would be better not to dismiss the bill.

Mr. *Wigram*.

It must be liberty to apply, generally; because I shall apply for the costs of this application.

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The terms of the order were, that all further proceedings in the cause should be stayed, and that the Defendant *Lashmar* should be at liberty to apply to the Court as he should be advised.

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On

On the 2d of *November* 1840, the Defendant *Lashmar*, by leave of the Lord Chancellor, moved, before his Lordship, that 2182*l.* 16*s.* 3*d.* bank annuities standing in the name of the Accountant-General, in trust in the cause, and which had been purchased with the sum of 2000*l.* cash paid by the Defendant *Lashmar* into the bank, to the credit of the cause, pursuant to the order of the 15th of *July* 1839, might be transferred into the name of the Defendant *Lashmar*, and that the sum of 65*l.* 9*s.* 8*d.*, cash in the bank, on the credit of the cause, and which had arisen from the dividends on the bank annuities, might be paid to him; and that it might be referred to the Master to tax the costs of the Defendants in this suit, including the costs of and relating to the application to discharge the writ of *ne exeat regno* issued against the Defendant *Lashmar*, and of and relating to the application made by the Plaintiffs on the 16th of *January* 1840, and of and relating to the present application; and that such costs, when taxed, might be paid by the Plaintiffs; or otherwise, that the order of the 16th of *January* 1840 might be discharged, so far as it stayed proceedings in the suit; and that, upon transfer and payment of the bank annuities and cash to the Defendant *Lashmar*, the Plaintiffs' bill might stand dismissed out of this Court.

In opposition to this motion, the Plaintiffs brought before the Court, upon affidavit, the correspondence which has been stated in a previous part of this report.

Mr. *Wigram* and Mr. *James Russell*, in support of the motion.

Mr. *Richards* and Mr. *Lloyd*, *contra*.

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*The*

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*The* LORD CHANCELLOR (addressing Mr. *Richards* and Mr. *Lloyd*,)

I cannot make you pay the costs of the suit. I certainly should not think, on the Defendants' shewing, that they should have costs against you. My reason is, that the suit has arisen from a mistake. The suit cannot be dismissed with costs. You do not dispute that the Defendant *Lashmar* is entitled to the money. The only question is, whether the Plaintiffs are to have their own costs. The costs of the orders will be costs of the suit. You do not object to the bill being dismissed.

Mr. *Richards*. No.

*The* LORD CHANCELLOR.

Let the bill be dismissed, *without costs*.

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BETWEEN

FRANCES RISHTON, by HORACE EARLE, her  
next Friend - - - Plaintiff;

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July 26, 27.  
Dec. 16.

AND

JOHN MITCHENER COBB, WILLIAM COBB,  
WILLIAM EDMUNDS, CHARLES COOK,  
and HENRY RISHTON (out of the Jurisdiction of  
the Court) - - - Defendants.

**T**HIS case is reported in the ninth volume of Mr. *Simons' Reports.* (a)

The question turned upon a short clause in a will, and upon a few circumstances connected with the terms in which the legatee was described.

*Thomas Cobb*, of *Margate*, by his will, dated the 1st of *March* 1834, bequeathed as follows: — “ I give and bequeath to *William Cobb*, *William Edmunds*, and *Charles Cook*, the sum of 2000*l.* sterling, upon trust to invest the same in government securities, upon trust to authorize and empower Lady *Fanny Campbell*, widow of the late Major General Sir *Niel Campbell*, to receive the dividends as they become due, so long as she shall continue single and unmarried; but in case she sells, assigns, or disposes of, or anticipates such dividends, I do hereby revoke the bequest so made for her benefit, and thereupon do will and direct that the said sum of 2000*l.* shall become part of the residue of my estate. I also give and bequeath to the said Lady *Fanny Campbell* the sum of 500*l.* sterling, to be paid to her within two months

Bequest to Lady C., widow of Sir N. C., considered valid, although at the date of the will she had married a second husband, R., and the fact of that marriage was unknown to the testator, and she continued to call herself Lady C. The bequest was a bequest of a fund to trustees to pay to her the dividends so long as she should continue single and unmarried; and if she should anticipate such dividends, then the fund to become part of the fund.

(a) 9 *Sim.* 615.

of the testator's residue. Held, that she took an absolute interest in



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after my decease ; but in case there is any debt due from her on a warrant of attorney lately given to Messrs. *Rice* and *Goodyer*, I direct my executors, out of the legacy, to pay such debt, and to pay the residue of such 500*l.* to Lady *Campbell* only. I also give her back the diamond ring she gave me, and request her to have the diamond reset in a mourning ring, and wear it for my sake." The testator gave the residue of his personal estate to *John Mitchener Cobb* and *William Cobb*, and appointed them and *William Edmunds* his executors.

The testator died in the month of *February* 1836.

The lady mentioned in his will had been the wife of Major-General Sir *Niel Campbell*, who died in the year 1827 ; but in *October* 1829 she had married the Defendant, *Henry Rishton*, who, in *January* 1830, went to *Sierra Leone*, leaving her in *England*, and he had never returned, but, if alive, was still living in *Africa*.

The lady, after her marriage with *Rishton*, continued to style herself Lady *Campbell*, except when she signed receipts for a pension granted to her as Sir *Niel Campbell's* widow, on which occasion she signed her name of *Frances Rishton*.

The plaintiff's evidence was confined to proving the marriage of the Plaintiff with *Henry Rishton*, and the fact that *Rishton* went to *Sierra Leone* in the month of *January* 1830, three months after the marriage, and that he had ever since resided, and if living, still continued to reside in *Africa*.

The Defendants' evidence consisted of the proof of the warrant of attorney mentioned in the testator's will,

will, and of a promissory note and a memorandum signed by the Plaintiff as *Frances Campbell*, and of depositions of witnesses upon the question of the Plaintiff's passing at *Margate* as the widow of Major-General Sir *Niel Campbell*, not yet married again.

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The deposition of a witness named *Neame* stated that the testator frequently spoke of and alluded to the Plaintiff, in conversations with the deponent and other persons, as *Lady Campbell*, or *Lady Niel Campbell*, and that he particularly referred to the superiority of her rank above the general society of the place, and that the deponent never had any conversation with the testator on the subject of the testator's having made to the Plaintiff any proposal of marriage, but that the Plaintiff had repeatedly mentioned to the deponent that she would not marry the testator on any account, as his temper was too arbitrary and overbearing, and that he was deficient in those little attentions which ladies expect.

A witness named *Lydia Dowson*, who was in the service of the Plaintiff from *May 1834* to *March 1836*, stated that, during that time, the Plaintiff represented herself to be the widow of Sir *Niel Campbell*, and that the testator and the Plaintiff frequently visited and communicated with each other, and that she (the witness) had been frequently informed by the Plaintiff that the testator had made her an offer of marriage, and that the Plaintiff, upon those occasions, informed the deponent that she never would marry him on account of his violent and overbearing temper, for that she herself was of an equally irritable disposition.

Other witnesses were also examined, and it appeared from their testimony, as well as from the testimony of the witnesses before-mentioned, that the Plaintiff  
used

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used the name of *Lady Campbell*, and that the testator addressed her and spoke of her as such ; and that she was considered, at *Margate*, to be the widow of Sir *Niel Campbell*, not married again.

There was no positive evidence of the Plaintiff having represented herself to be a single woman.

The Vice-Chancellor having made a decree in the Plaintiff's favour, the Defendants *John Mitchener Cobb* and *William Cobb* appealed from it, and insisted, by their petition of appeal, that the bill ought to be dismissed with costs.

Mr. *Wakefield* and Mr. *Randell*, for the Plaintiff, referred to the following cases with regard to the legacy of 500*l.* ; *Standen v. Standen* (a), *Kennell v. Abbott* (b), *Stockdale v. Bushby* (c), *Giles v. Giles* (d) ; and with regard to the bequest of 2000*l.* they cited *Wheeler v. Bingham* (e), *Brown v. Peck* (g), *Marples v. Bainbridge* (h), *Lloyd v. Branton* (i), *Bird v. Hunsdon* (k), *Poor v. Mial* (l), *Hale v. Beck* (m), *Philipps v. Chamberlaine* (n), *Elton v. Sheppard* (o), *Rawlings v. Jennings* (p), *Page v. Leapingwell* (q), *Adamson v. Armitage* (r), *Stretch v. Watkins* (s), *Billing v. Billing*. (t)

Mr.

(a) 2 *Ves. jun.* 589.

(b) 4 *Ves.* 802.

(c) 19 *Ves.* 381.

(d) 1 *Keen*, 685.

(e) 3 *Atkyns*, 364.

(g) 1 *Eden*, 140.

(h) 1 *Madd.* 590.

(i) 3 *Mer.* 108.

(k) 2 *Swan.* 342.

(l) 6 *Madd.* 32.

(m) 2 *Eden*, 229.

(n) 4 *Ves.* 51.

(o) 1 *Bro. C. C.* 532.

(p) 13 *Ves.* 39.

(q) 18 *Ves.* 463.

(r) 19 *Ves.* 416.

(s) 1 *Madd.* 253.

(t) 5 *Sim.* 252.

Mr. *Knight Bruce* and Mr. *Rudall*, in support of the appeal, referred to *Innes v. Mitchell* (a), *Chauncy v. Graydon* (b), *Richards v. Baker* (c), *Humberstone v. Stanton* (d), *Dommett v. Bedford* (e), *Doe v. Hawke*. (g)

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They contended that the qualification, in respect of marriage, which the testator introduced into his bequest of the 2000*l.* was a limitation and not 'a condition. They submitted that the evidence of the Plaintiff's husband having gone to *Africa* three months after the marriage, and having remained there ever since, did not amount to proof of a desertion of her by him. They insisted that the bequest was, in this instance, made to the Plaintiff under an assumed character, and that the testator had declared that the bequest should continue only so long as that character remained, and as that character had not at any time since the testator's death existed in fact, the bequest failed from the beginning. They maintained that the utmost interest given by the will was a limited interest, to continue during widowhood; and not an absolute interest, subject to a condition that it should cease upon marriage.

Mr. *Wakefield*, in reply.

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The LORD CHANCELLOR.

Dec. 16.

The Defendants, by their appeal, dispute the Plaintiff's title to any decree, and therefore insist that she has no title either to the 500*l.* or to the 2000*l.* The case as to the two sums is different; but one objection relied upon by the Defendants applies to both. The Defendants insist that the Plaintiff, having been supposed by

(a) 6 *Ves.* 464.

(b) 2 *Atkyns*, 616.

(c) 2 *Atkyns*, 321.

(d) 1 *V. & B.* 385.

(e) 6 *Term Rep.* 684.

(g) 2 *East*, 481.

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by the testator to be the widow of her first husband, Sir *Niel Campbell*, is not entitled, under the circumstances proved in the cause, to the legacies given to her by his will. This must depend upon the circumstances proved, because it is clear that mere misapprehension on the part of a testator as to the situation of a legatee will not avoid the legacy. After looking through all the cases upon the subject, which are but few in number, I do not find that I can better define what circumstances will make the legacy void than by adopting the words of Lord *Alvanley* in *Kennell v. Abbott* (a), namely, that when a legacy is given to a person, under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy. I think the evidence in this case fails to bring it within this definition. That the Plaintiff, notwithstanding her marriage, continued to call herself Lady *Campbell*, was not, of itself, an assumption of a false character. That is so generally done, after a marriage with a second husband of inferior rank to the first, that no imputation of improper motives can be founded upon it. There is, however, I think, evidence of her having concealed her second marriage, or at least of her having permitted those with whom she lived, and amongst others the testator, to assume and believe that she had not been married a second time; but I think there is a total absence of proof that this was done from any improper motive. If, indeed, there had been proof that she had permitted the testator to entertain hopes of himself marrying her, there might have been ground for suspecting that the concealment of her first marriage had arisen from an interested motive; but the Defendants, by some evidence they have given, have displaced any such supposition, for they have proved

(a) 4 *Ves.* 802; see 809.

proved a statement by her that she had refused proposals of marriage which the testator had made to her. The reason she assigned was not, in all probability, the true one; but the fact she states goes far not only to remove any suspicion of improper motives in the course she adopted, but to negative any idea that the testator's testamentary disposition in her favour was influenced by any expectation of her becoming his wife, or, in the words of Lord *Alvanley*, that the assumed character was alone the motive of the bounty. It is obvious that the rule, that, where the identity of the legatee is certain, the legacy will not be avoided by an inaccuracy in the description given to him, will be destroyed, if the Court permits itself to speculate, without proof, upon what may have been the object of the testator in giving the legacy. In *Standen v. Standen* (a), it was impossible to ascertain what the testator would have done if he had known that the legatee was illegitimate, or in *Schloss v. Stiebel* (b), if he had foreseen that he should die before his marriage with the person he describes as his wife. The Court, therefore, must be satisfied that the assumed character was the motive for the bounty. That the testator was much attached to the legatee is evident from the provisions of the will; but that such attachment existed only upon the supposition that she was unmarried, or that his desire of benefiting her would have ceased if he had known of her being married, is not established.

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I am, therefore, of opinion that the testator's misapprehension as to the situation of the legatee does not invalidate the legacies to her, and, consequently, that she is entitled to the 500*l.*, and that the 2000*l.* legacy is free from this objection. But, as to this legacy, it is said that the terms of the gift exclude the legatee, being

a married

(a) 2 *Ves. jun.* 589.

(b) 6 *Sim.* 1.

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a married woman, from claiming it. It is, first, to be considered what would have been the interest of the legatee in the 2000*l.* if she had not been married. It is a gift of the 2000*l.* to trustees, upon trust to invest it in the public funds, and to pay the dividends to her so long as she shall continue single and unmarried, with a direction that if she sells, assigns, disposes of, or anticipates such dividends, the bequest shall be revoked, and that thereupon the 2000*l.* shall become part of the residue. If, therefore, she had been single and unmarried, and had so remained, she would have been entitled to the dividends, without any limitation of time. Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest. This gift, therefore, is of the dividends of stock, without limitation as to time, which carries the stock itself; *Hale v. Beck* (a), *Philipps v. Chamberlaine* (b), *Billing v. Billing* (c), *Elton v. Sheppard* (d), *Page v. Leapingwell*. (e)

It was contended, that the direction to pay the dividends to the legatee so long as she shall remain single and unmarried, was a limitation, and not a condition. In *Marples v. Bainbridge* (g), Sir T. Plumer rejected the distinction. His judgment upon that point has been objected to; and in this case, the distinction does not appear to me to be material, because, if the situation of the legatee does not make the legacy altogether void,

which

(a) 2 *Eden*, 229.

(b) 4 *Ves.* 51.; see 58.

(c) 5 *Sim.* 232.

(d) 1 *Bro. C. C.* 532.

(e) 18 *Ves.* 463.

(g) 1 *Madd.* 590.; see 592.

which I think it does not, this provision must be rejected as inapplicable. To consider the being single as a condition precedent would be inconsistent with the cases which have decided that an error in describing the *status* of the legatee does not avoid the legacy; and if it be considered as a condition subsequent, or as a limitation until marriage, the gift is not affected by it. In *Crommelin v. Crommelin* (a) provisions in a father's will respecting his daughter's marriage, were held not to apply to a daughter who, having married in her father's lifetime, after his death married a second time. In *Bird v. Hunsdon* (b), a direction to pay interest to maintain a legatee so long as she remained single, with a gift over upon her death, was held to give to the legatee the interest for life, notwithstanding her marriage. In that case, considerable violence was done to the directions of the testator, to effectuate his apparent general intent. In this case, all that is necessary to carry his general intent in favour of the legatee into effect, is to reject a provision inapplicable to the real situation of the legatee. There is no gift over, upon marriage or upon death, but only upon alienation, which is void, because inconsistent with the interest given.

This case is certainly very peculiar in its circumstances; but, for these reasons, I am of opinion that the decree of the Vice Chancellor was right in declaring that the Plaintiff was absolutely entitled to the 500*l.* and 2000*l.*; and if so, the Defendants cannot object to the other directions, which do not affect them, but are necessary in consequence of the situation of the Plaintiff being that of a married woman deserted by her husband.

The case is certainly one of considerable difficulty; but after one decision upon it, which I think right, I cannot make the legatee bear even her own expenses of a second discussion. I, therefore, dismiss the appeal, with costs.

(a) 3 Ves. 227.

(b) 2 Swanst. 342.



1840.

BETWEEN

Feb. 12. 14. 21. NIVEN KERR and EDWARD HENRY CHAP-  
MAN - - - - Plaintiffs;

AND

JOHN REW and KARL GUSTAV KRUGER  
Defendants.

A bill of discovery in aid of the defence to an action at law cannot be maintained against a person interested in the action, unless he is a party to the record at law.

In an action on a policy of marine insurance brought by the agent in whose name the policy was effected, the person named in the declaration as the real person assured is not to be considered a party to the record at law, so as to be liable to a bill of discovery.

**T**HIS was an appeal from an order of the Vice Chancellor, allowing a demurrer of the Defendant *Kruger* to the Plaintiff's bill.

The bill stated that the Plaintiffs were two of the directors of the Indemnity Mutual Marine Assurance Company, and that the Defendant *Rew*, on or about the 1st of *September* 1837, effected, in his own name, with the Plaintiffs, acting on behalf of the Company, a policy of assurance of that date, for the sum of 175*l.* upon bristles, laden or to be laden on board a ship called "The *Gustav*," at or from *Dantzic* to *Hull*, and that the insurance included perils of the seas :

That the Defendant *Kruger* claimed to be solely and exclusively interested in all benefit to be derived from the policy, and that the Defendants *Rew* and *Kruger* had produced certain papers to the Plaintiffs and to the Assurance Company, in support of a claim made by the Defendants respectively, as after mentioned, for the full amount insured by the policy ; and that by one of such papers, purporting to contain extracts from the log books on board the ship, it was stated that there were on board, previously to and on the 4th of *September* 1837, amongst other goods and merchandise, the goods and merchandises

merchandises mentioned and described in the policy, and to the amount mentioned in the policy.

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The bill then stated various particulars as appearing from the papers before mentioned, shewing that the vessel set sail from *Dantzic* on the 4th of *September* 1837, with the insured cargo on board, and that on the 11th of *September* she had sprung a leak, and that on the 13th of *September* she foundered, and was lost.

The bill then stated, that the Plaintiffs and the Company had, recently, and long since the policy was effected, discovered, as the fact and truth was, that the ship was unseaworthy at the time she left *Dantzic* upon the before-mentioned insured voyage, and was utterly incapable, from such unseaworthiness, of performing the voyage :

That the Plaintiffs and the Company had, recently, and long since the policy was effected, discovered, as the fact and truth was, that the goods and merchandises mentioned in the policy, were not on board when the ship left *Dantzic*; or that if they had been put on board, they had been unshipped, and were not on board when she was lost :

That the alleged shipment of the goods was a fraudulent shipment :

That, on or about the 19th of *June* last, an action was commenced, in the Court of Exchequer of Pleas, against the Plaintiffs, for the purpose of recovering, from the Plaintiffs and the Company, the sum of 175*l.* upon the policy ; and that the action was commenced in the name of the Defendant *Rew* ; and that a declaration had been delivered in such action, and that in such declaration it was averred that the policy was duly made and executed,

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and that the policy was made by him *Rew* as the agent of *Kruger*, and for his use and benefit, and that, afterwards, on the 11th of *September* 1837, *Rew* paid for the use of the Company, at their office, 9*l.* 3*s.* 9*d.* as such premium and consideration as in the declaration mentioned, and that *Kruger* was then and from thence continued afterwards, until and at the time of the loss thereafter mentioned, interested in the goods to a large amount, viz., to the amount of all the monies by him insured or caused to be insured thereon, and that the ship was, by the perils and dangers of the seas, and by tempestuous weather, foundered and destroyed.

The bill charged that the ship was perfectly unseaworthy when she sailed from *Dantzic* on the 4th of *September*, 1837, and of very small value; and that so it would appear, if the Defendants would set forth various particulars specified in the bill; and that the Plaintiffs had lately discovered, as the fact and truth was, that the ship was the same vessel as one which, in the year 1836, its owner or owners proposed to another Company, namely, the Alliance Marine Assurance Company, for insurance for 600*l.*, which was then considerably more than her value, and that that Company refused to insure her, and that she had not been repaired in or since 1836; and that so it would appear, if certain specified particulars were set forth.

The bill then, after stating a pretence that a very valuable cargo, consisting of bones and bristles, was shipped on board the vessel at *Dantzic*, and remained on board till the ship sank, charged the contrary, and that so it would appear, if various specified particulars were set forth.

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The bill then charged that the policy was made by *Rew* only as the agent of *Kruger*, and for his use and benefit, and not for any use or benefit to *Rew*, and that *Rew* had not, nor ever had, any interest in the ship or in the cargo or freight thereof; but that in all the matters and transactions before mentioned, he had acted on behalf and for the benefit and as agent of, *Kruger*; and that such interest of *Kruger* in the policy had continued from the time of the making the policy until the present time, and that no person except *Kruger* had ever claimed or now claimed any interest in the policy; and that *Kruger* had made divers other insurances upon the ship and her cargo and freight; and that such several insurances far exceeded the total amount of interest which *Kruger* had now or ever had in the ship and in her cargo and freight; and that so it would appear if *Kruger* would set forth certain particulars mentioned in the bill.

The bill further charged that the bristles were of an inferior quality, and of inconsiderable value; and that certain particulars with reference to them ought to be set forth; and that when the ship sailed from *Dantzic* her crew was insufficient and in bad health; and that certain particulars with respect to them ought to be answered by the Defendants; and that the crew were inexperienced; and that the carpenter did not understand his business; and that it appeared from the ship's papers that she left *Elsinore* on the 9th of *September*, in company with fifty sail, all of which were exposed to the same weather to which she was exposed, and that none of them were lost.

The bill further charged that the action so brought as before mentioned in the name of *Rew*, had been brought at the expense and for the benefit of *Kruger* by

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*Rew*;

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*Rew*; or else that *Kruger* had brought it in the name of *Rew*, and by virtue of a power of attorney from *Rew*; or else that *Kruger*, or some person or persons on his behalf, had brought the action and served the declaration therein on behalf of the Defendants and for the benefit of *Kruger*, without any authority and without the knowledge and privity of *Rew*; and it charged that *Rew* had no interest whatever in the action, and that no communication with respect to the same had ever taken place between *Rew* and the person or persons bringing the action, or any one of them.

The bill then charged that *Kruger* resided and was then at *Dantzic*, out of the jurisdiction of this Court; and that *Kruger* never came within the jurisdiction of this Court; but that, on the contrary, he took care to remain without the limits of such jurisdiction, in order that he might not be compelled to give discovery on the matters before mentioned; and that he well knew that such discovery would supply the Plaintiffs with a valid defence to the action.

The bill then charged that some letters or correspondence had passed between the Defendants and the commander and mate of the ship and the sailors employed upon board and some other persons residing at *Dantzic*, *Fahrsund*, and elsewhere, on the subject of the matters before mentioned, or some of them, or in some manner respecting the ship and her alleged cargo; and that the Defendants had in their possession such correspondence and various other particulars, by which, if produced, the matters mentioned in the bill, or some of them, would appear; but that the Defendants refused to produce the same, or to make any discovery thereof; and that there were divers persons at *Dantzic*, *Fahrsund*, and elsewhere abroad, who would be able to  
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prove the matters before mentioned, or some of them, and whose testimony it would be very material for the Plaintiffs to have, on the trial of the action; but that the Defendants refused to allow any time for producing such testimony, and that they threatened and intended to proceed immediately to trial in the action, and afterwards to judgment and execution against the Plaintiffs, unless restrained by injunction.

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The prayer of the bill was, that the Defendants might make a full and true discovery touching all the matters before mentioned; and that one or more commission or commissions might issue out of this Court for the examination of the Plaintiffs' witnesses at *Dantzic*, *Fahrsund*, and elsewhere abroad, to the end that the Plaintiffs might have the benefit of the testimony of such witnesses at the trial of the action; and that, in the mean time, the Defendants might be restrained, by injunction, from proceeding in the action, and from commencing any other action or proceeding at law against the Plaintiffs, or against the Indemnity Mutual Marine Assurance Company, or any members or member thereof, touching the matters before mentioned.

To this bill the Defendant *Kruger*, on the 19th of *August* 1839, put in a demurrer, assigning, as grounds of demurrer, first, want of equity, and, secondly, that the discovery and injunction sought by the bill related to distinct actions between different parties. The latter ground of demurrer was abandoned.

The Vice Chancellor having allowed the demurrer, the Plaintiffs appealed from his Honour's decision.

Mr. *Richards* and Mr. *Calvert*, in support of the appeal, referred to the stats. 19 G. 2. c. 37. and 28 G. 3.

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28 G. 3. c. 56., and to the cases of *Bell v. Aynsley* (a), *Bell v. Smith* (b), *Fenn v. Granger* (c), *Rex v. the Inhabitants of Woburn* (d), *Rex v. Hardwick* (e), *Phillipps on Evidence*, vol. i. p. 74. third edition, *Dowden v. Fowle* (g), *Fenton v. Hughes* (h), *Irving v. Thompson* (i), *Glyn v. Soares and the Queen of Portugal* (k), *Shackell v. Macaulay* (l), *Chimelli v. Chauvel* (m), *Bromley v. Holland* (n), *Kensington v. White* (o), *Hylton v. Morgan* (p), *Worrall v. Jones* (q), *Starkie on Evidence* (r), *Solomons v. Bank of England* (s), *Whitworth v. Davis* (t), *Powell v. Yeatts* (u), *Guppy v. Few* (v), *Bishop of London v. Fytche*. (w)

Mr. *Stuart* and Mr. *Willcock*, in support of the demurrer, referred to *Tooth v. Dean and Chapter of Canterbury* (x), *Glyn v. Soares* (y), *Hanson v. Parker*. (z)

Mr. *Richards*, in reply.

The points made in argument sufficiently appear from the Lord Chancellor's judgment.

Feb. 21.

The LORD CHANCELLOR.

In this case the policy of insurance was in the name of Mr. *Rew*: the action is brought by *Rew* against the underwriters.

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|---|-------------------------------------|
| (a) 16 <i>East</i> , 141.                             | (o) 3 <i>Price</i> , 164.           |
| (b) 5 <i>Barn. &amp; Cress</i> . 188.                 | (p) 6 <i>Ves</i> . 293.             |
| (c) 3 <i>Camp</i> . 177.                              | (q) 7 <i>Bing</i> . 395.            |
| (d) 10 <i>East</i> , 395.                             | (r) Vol. II. p. 23.                 |
| (e) 11 <i>East</i> , 578.                             | (s) 13 <i>East</i> , 135.           |
| (g) 4 <i>Campbell</i> , 38.                           | (t) 1 <i>Ves. &amp; B.</i> 545.     |
| (h) 7 <i>Ves</i> . 287.                               | (u) 9 <i>Sim</i> . 25, cited.       |
| (i) 9 <i>Sim</i> . 17.                                | (v) <i>Hare on Discovery</i> , 126. |
| (k) 1 <i>Yo. &amp; Col. Exchr. Rep.</i> 644. and 653. | (w) 1 <i>Bro. C. C.</i> 96.         |
| (l) 2 <i>Sim. &amp; St.</i> 79.                       | (x) 3 <i>Sim</i> . 49.              |
| (m) <i>Younge</i> , 302.                              | (y) 3 <i>Myl. &amp; Keen</i> , 450. |
| (n) 7 <i>Ves</i> . 3.                                 | (z) 1 <i>Wilson</i> , 257.          |

underwriters. The declaration alleges that the policy was made by *Rew* as agent for *Kruger*, and that *Kruger* was and is interested in the goods insured. The bill of discovery is filed by the underwriters against *Rew* and *Kruger*, alleging that *Kruger* was and is exclusively interested. A general demurrer is put in by *Kruger*; and the question is, whether a bill of discovery can be supported against the assured, the action being by their agent, but alleging interests in them.

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There are two questions to be considered: first, whether bills of discovery can be supported against persons interested, though not parties to the record at law? secondly, whether, in this case, the assured can be considered as parties to the record?

As to the first, it is to be observed that bills of discovery in aid of the defence to an action are permitted as a means of defence against the antagonist at law, by obtaining from him the means of defence, and not for the purpose of procuring evidence. It is now nearly forty years since Lord *Eldon*, in *Fenton v. Hughes*, reported in 7th *Vesey*, 287., allowed the demurrer of the Defendant *Bate* to a bill of discovery, which alleged that he, *Bate*, was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby, and he was or would be liable to pay all or some part of the costs, in case *Hughes*, the Plaintiff in the action, should not recover; according to the statement in the bill as made by the Vice Chancellor in *Irving v. Thompson*. (a) Lord *Eldon* observed that *Bate* could not be a witness for the Plaintiff at law, on account of his interest, but that the Defendant might examine him, and that the superior advantage

(a) 9th *Simons*, 17.; see p. 25.



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advantage of a discovery by answer, particularly as to the production of papers, was not sufficient to make an exception to the rule, that a bill of discovery would not lie against a mere witness. This case is of the highest authority. Lord *Eldon* went fully into the subject, and his judgment was according to all the former precedents. In 1803, the case of the *Mayor of London v. Levy* (a), and, in 1808, the case of *Le Texier v. The Margravine of Anspach* (b), laid down the rule in the same way.

In 1813 Sir *Thomas Plumer* acted upon these cases in *Powell v. Yeatts*, as stated by the Vice Chancellor in his judgment in *Irving v. Thompson*; as he did, in the same year, in *Whitworth v. Davis*. (c) The Vice Chancellor, in *Tooth v. The Dean and Chapter of Canterbury* (d), and Lord *Lyndhurst*, in *Few v. Guppy*, reported in Mr. *Hare's* book on Discovery (e), recognized and acted on the authority of *Fenton v. Hughes*. In 1835, in the case of *Glyn v. Soares* (g) at the Rolls, I considered the rule as clearly settled; and in 1839 the Vice Chancellor, in *Irving v. Thompson*, reviewed all the cases and acted upon the rule. It can add nothing to the weight of this series of authorities for me to say, speaking from an experience of more than thirty-five years, that I have no recollection, till very lately, of having ever heard any doubt suggested as to the rule of Courts of Equity on this subject; and, until certain cases occurred which are now under review (h), no decision or dictum is to be found favourable to any such doubt.

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(a) 8 *Vesey*, 398.

(b) 15 *Vesey*, 159.

(c) 1 *V. & B.* 545.

(d) 5 *Simons*, 49.

(e) *Guppy v. Few* and *Few v. Guppy*, 126.

(g) 3 *Mylne & Keen*, 450.

(h) See the case of *Glyn v. Soares and the Queen of Portugal*, 1 *Y. & C. Exch. Rep.* 644. 653., which was at this time under appeal in Dom. Proc. See 1 *West's Rep.* 258. and 7 *Cl. & Fin.* p. 466.

Some observations of Lord *Hardwicke*, in *Plummer v. May* (a), have been relied on against these authorities; but it is obvious the bill, in that case, was a bill for relief, Lord *Hardwicke* saying there were charges in the bill, which, if proved, would entitle the Plaintiff to a decree against the Defendant for an account. *The Bishop of London v. Fytche* (b) has been mentioned as an instance in which a bill of discovery was filed against a Defendant not a party to the action at law. I have caused the Registrar's Books to be searched, and I find, on examining them, that the report in *Brown* is erroneous, and that Mr. *Eyre*, the clerk, who is stated in *Brown* to have been a party Defendant, was not a party to that bill.

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The case of *Dummer v. The Corporation of Chippenham* (c) was also referred to; but Lord *Eldon's* observations in p. 250. only shew that, in his opinion, the principle of permitting the Plaintiff in a suit against a Corporation, to seek discovery from an officer of the Corporation, might be extended to individual members of it. *Balch v. Wastall* (d) appears to have been a bill for relief, and not for discovery only; and the object was to make the assets in the hands of the Defendant liable to the Plaintiff's judgment. The cases of officers of corporations have obviously no application to the present case. *Angerstein v. Wentworth* (e) does not prove much; but, as far as it goes, it is an authority in favour of the rule.

If such be the rule in the general cases of parties interested, though not parties to the record at law, is the case

(a) 1 *Ves. Sen.* 426.

(b) 1 *Brown, C. C.* 96.

(c) 14 *Ves.* 245.

(d) 1 *Peere Williams*, 445.

(e) 1 *Fowler*, 227. p. 258., 1st ed.

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case of the assured, not parties to an action on the policy, within the rule? In what respect does their situation differ from that of the Defendant *Bate*, in *Fenton v. Hughes*? In that case, the demurrer admitted that *Bate* was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby; which is precisely the case of the assured. They are, indeed, named on the record, but not as parties; being so named only in compliance with the provisions of the statute. It was argued that the assured, being so named, was in the situation of the lessor of a Plaintiff in ejectment; the difference is, that the lessor of the Plaintiff is, in all respects, considered a party to the record, and the assured is not; the best proof of which is, that he may be examined as a witness for the underwriters. Lord *Abinger*, in *Glyn v. Soares and the Queen of Portugal (a)*, stated this to be the clear rule at law; and, as this proposition was questioned at the bar, I have taken the benefit of consulting the highest authority on that subject, who fully concurs with Lord *Abinger* in that opinion.

A proposition was then stated, which is, I believe, entirely new, that a bill of discovery might be filed against any person whose admission might be used at law, in favour of the Plaintiff to the bill. No authority, except the recent case of *Glyn v. Soares and the Queen of Portugal*, was cited for this purpose, and very little attention to the rules of law as to receiving admissions as evidence, will shew that the proposition is wholly untenable; but what affords the clearest answer to this argument is, that, in *Fenton v. Hughes*, the declarations of *Bate*, assuming the facts to be as stated in the bill,

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(a) See 1 Y. & Coll. Exch. Rep. 655.

and admitted by the demurrer, would have been admissible in favour of the Plaintiff to the bill of discovery.

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It was then argued, that examining the person as a witness who may have important papers and documents in his possession is far less effectual than obtaining his answer to a bill of discovery; but all this was considered by Lord *Eldon* in *Fenton v. Hughes*; yet he held that those considerations, though well founded, did not justify filing a bill of discovery against the person who might be examined as a witness.

It was, in the last place, contended that a practice had existed in the Exchequer, within the last fifteen years, of filing bills of discovery against the assured who are not parties to the record at law.

I am not very competent to say what has taken place in the Exchequer within the last fifteen years; but I think I may venture to be very confident that no such practice existed for the twenty years which preceded those fifteen years; in fact, it never was the practice, during that period, at least, to file a bill of discovery at all: the bills always prayed relief. To satisfy myself of the correctness of my recollection on this subject, I have looked through very many precedents which, from the names attached to them, must cover a large portion of a century; and I find but one bill of discovery, and that, under circumstances by no means applicable to the present case; all the others prayed relief.

I cannot, therefore, but think that the bills in the Exchequer against the assured, which have been supposed to be bills of discovery only, were, in fact, bills for relief; and if they were bills for discovery, I cannot doubt

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doubt that the practice which has been adopted was permitted to continue through inadvertence.

The case of *Vandam v. Munro* (a) would appear, from the report, to be the case of a bill of discovery ; if it is, it would be an instance of such a bill being filed against the assured not parties to the record at law. Considering the practice which was generally adopted in such cases, it is most probable that that bill also prayed relief.

It was said, that not permitting bills of discovery to be filed against the assured, would promote fraud, as the agent who effects the insurance cannot be supposed to possess the documents, or to have any important discovery to make. But this evil the Court has the power, in a great measure, of averting, by granting commissions when necessary ; whereas, by permitting bills of discovery to be filed against the absent assured, and thereby staying proceedings in the action by the agent who effected the policy, until such absent assured had answered the bill, a ready means would be afforded, in every instance of a foreign insurance, to delay and probably defeat the remedy against the underwriter, to the great injury of the assured in many particular cases, and to the great discouragement of foreign merchants to effect insurances in this country.

I think, therefore, the decision of the Vice Chancellor in *Irving v. Thompson* is correct in principle, and in conformity with all authority. I, therefore, adopt the same rule of decision in this case, and allow the demurrer.

(a) 2 *Anstruther*, 502.

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BETWEEN

JOHN MUNDY the younger - - Plaintiff;

AND

HYLTON JOLLIFFE, and Sir WILLIAM  
GEORGE HYLTON JOLLIFFE, Bart.

Defendants.

*Feb. 27.*  
*March 1.*  
*Nov. 5.*

**T**HIS was a bill filed by a tenant against his landlord, for the specific performance of a parol agreement to grant a lease, on the ground of part performance of the agreement on the part of the tenant.

Specific performance of a parol agreement to grant a lease enforced against the intended landlord, on the ground of part performance, and on evidence consisting of a memorandum by the landlord, the parol testimony of a witness present, and the draft of a lease prepared by the landlord's steward, though the draft of the lease provided that the tenant should do an act for the landlord's benefit, which was not mentioned in the landlord's memorandum or the witness's testimony.

The bill stated that, in and for some time previously to the month of *January* 1826, the Plaintiff occupied a farm called *Lylands*, in the parish of *Buriton*, which is part of the borough of *Petersfield*, in *Hampshire*, as tenant from year to year, of the Defendant, *Hylton Jolliffe*, at the yearly rent of 120*l.*, without being bound to repair the buildings, or to drain the land; and that in the month of *January* 1826, the Plaintiff and the Defendant *Hylton Jolliffe*, and Mr. *Hector* his steward, met upon the farm; and that it was then agreed, that the Plaintiff should have a lease of the farm for fourteen years from the 29th of *September* 1825, determinable by either party at the end of the first seven years on giving six months' notice, at the existing rent of 120*l.*, and upon the terms of the Plaintiff undertaking, at his own expense, well and effectually to drain the lands upon the farm, and to lay down into pasture the only piece of arable land which the farm contained, and to keep the buildings

Observations on part performance as a ground for avoiding the operation of the Statute of Frauds.

Observations on the landlord's setting up, as a defence, that the tenant had done acts which would be breaches of the covenants of the intended lease.

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buildings in repair, the Defendant *Hylton Jolliffe* finding the timber; and that thereupon the Defendant *Hylton Jolliffe* gave instructions in writing to Mr. *Hector* for the preparation of the lease, and that such instructions were in the terms following: — “*Mundy*, junior, to have a lease for seven or fourteen years, to be found timber for repairs, and to put down tile and stone drains, in all the fields necessary, at his own expense; to stand at the present rent.”

The bill also stated that the draft of the lease was prepared by a clerk of Mr. *Hector*, and under his directions, but that in consequence of Mr. *Hector* soon afterwards retiring from the stewardship, the lease was never engrossed or executed, and that the Plaintiff had lately discovered such to be the case, and that the draft of the lease still remained in the possession of the Defendants, or one of them; and that the Plaintiff, in part performance of the agreement for the lease, drained the lands of the farm, laid the piece of arable land into pasture, and repaired the buildings according to the agreement; and that, in the draining and repairs, he expended 150*l.*, besides his own skill and labour, and besides the expense of laying the arable land into pasture; and that on the 25th of *March* 1835, the Plaintiff received a notice to quit at *Michaelmas* next, and that such notice was dated the 10th of *March*, and was signed by the Defendant *Hylton Jolliffe*, and that the Plaintiff then discovered, for the first time, that the lease had never been engrossed or executed.

The bill proceeded to state that the Defendant *Hylton Jolliffe*, and the other Defendant, Sir *W. G. H. Jolliffe*, to whom the Defendant *Hylton Jolliffe* had lately conveyed his interest in the borough of *Petersfield* and also some share of his interest in the lands agreed to be demised to the Plaintiff, had, in *Michaelmas* term 1835, commenced

commenced an action of ejectment against the Plaintiff, in which they had delivered a declaration, and which was then pending.

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The bill charged that, in the year 1833, the then steward of the Defendant *Hylton Jolliffe* applied to the Plaintiff to give up the piece of land formerly arable, which had been laid down into pasture, and which had been drained, and at the same time offered to make to the Plaintiff a proper allowance for the expense of draining and laying it down, and to make a reduction of 8*l.* per annum in the rent of the farm; and that, the Plaintiff having consented to those terms, the piece of land was accordingly given up.

The Bill prayed that the Defendants might specifically perform the agreement, and execute the lease, and might be restrained from prosecuting the action of ejectment, or any other proceeding at law against the Plaintiff.

The Defendant *Hylton Jolliffe*, by his answer, did not, in terms, insist upon the Statute of Frauds, but he stated that, although it was in contemplation in or about the year 1826 to grant to the Plaintiff a lease of the farm, no such lease was ever executed by him (the Defendant), and that no memorandum or agreement for such lease was ever signed by him or by the Plaintiff: and that such lease never having been granted, nor any agreement for the same binding on either party either executed or signed, he believed that the Plaintiff did not, during his subsequent occupation of the farm, put down tiles and stones for draining, in all the fields necessary, at his own expense, or consider himself bound, or act as if he was bound, by the terms on which the Defendant had agreed to grant the Plaintiff a lease, and that he



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believed that the Plaintiff had not, during his occupation of the farm since 1826, paid the full rent intended to be reserved in the lease, or put down the tiles and stones for draining the fields at his own expense; and that, on the contrary, the draining and other tiles, had been supplied to the Plaintiff at the Defendant's expense since the month of *January* 1826, and that some sums of money had been paid on account of the Defendant for repairs of buildings on the farm after 1826; and that the Plaintiff had been allowed various deductions out of his rent, and in particular that the expenses incurred by the Plaintiff in draining and in laying down the arable land into pasture, and in repairs, had been allowed to the Plaintiff out of his rent, and that although the lease, as stated in the Plaintiff's bill, purported to contain a covenant, on the Plaintiff's part, not to grub up hedges or fences, the Plaintiff had grubbed up two ends of a quickset hedge, and had cut down the remainder of the hedge close to the ground, by which the farm had been materially injured; and that although, according to the draft lease, the Plaintiff was to do the draining within the two first years of the term, very little of it was done, until the year 1831 or 1832; and that, although the draft lease purported to contain a covenant to use on the farm all the manure produced on it, the Plaintiff almost always removed the manure made on the farm to another farm, which did not belong to the Defendant, and that after the Plaintiff had received notice to quit the farm, he had removed all the manure then on the farm to other lands, not the property of the Defendant.

The notice to quit, and the action of ejectment, and the sale of the lands from the one Defendant to the other, were admitted by the answers of the respective Defendants.

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The Plaintiff proved, by the examination of witnesses, that Mr. *Hector* was the steward of the Defendant *Hylton Jolliffe* for many years, until after the month of *January* 1826. He also proved, by examining Mr. *Hector* as a witness, that the meeting alleged in the bill took place between the Plaintiff and the Defendant *Hylton Jolliffe* and the witness, and that an agreement for a lease was then verbally made in certain terms stated by the witness, which corresponded with the terms stated in the bill, except that, as to the draining, the witness stated the agreement to be that the Plaintiff should drain the farm where necessary; and he proved, as an exhibit, a paper of memorandums, in the Defendant's (*Hylton Jolliffe's*) handwriting, but unsigned, given to him by the Defendant on the 15th of *January* 1826, in which was a memorandum in terms corresponding with those stated in the bill (a); and the witness stated that before he relinquished his stewardship, he caused to be prepared the draft of a lease in pursuance of the instructions contained in the memorandum. He identified, as exhibits, the draft, and also a fair copy of it made by his clerk, and said he was unable to state why the lease was never executed; but he believed it must have arisen, so far as he was concerned, from a pressure of other business, and from his being then about to retire altogether from professional business.

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The draft lease, proved as an exhibit, contained, besides the stipulations mentioned in the memorandum, covenants to lay down the piece of arable land into pasture, and not to grub up hedges or fences except for the purposes of making or repairing them, and, after the whole of the land should be laid down into pasture, then

(a) The memorandum stated the length of the term thus: "7-14 years."

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then to spread on the land all the manure to be made of the hay to be cut on the premises, except in the last year of the term ; and, in the last year, to leave all the manure of the former year, and also to feed certain cattle in the last year on the lands, or otherwise to bring on the land certain quantities of manure. The stipulation, in the draft lease, as to draining, was to drain all and every part of the arable and pasture land.

The Plaintiff proved, by the examination of witnesses, that he had laid down the piece of land into pasture in the year 1827 ; that he had done the draining and the repairs by the end of the year 1828, or thereabouts ; and that the only allowances made to him for draining or repairs were for draining a piece of bog ground not forming part of the same holding as the farm in question, and for materials used to repair the damage occasioned by a tempest. He proved that the hedge mentioned in the Defendant's answer had been grubbed up by the permission of the steward for the time being of the Defendant (*Hylton Jolliffe*), and that such permission was given upon the ground that the hedge was injurious to the farm. He proved that whatever manure had been removed from the farm had been manure made from straw and fodder not grown upon the farm ; and that, in the opinion of various witnesses, it was not contrary to the course of good husbandry to do so ; and that he had, at various times, purchased manure for the farm ; and that, after being served with notice to quit, the whole of the manure then on the farm was spread upon it, and that none was removed from the farm after notice to quit.

The Defendant *Hylton Jolliffe* cross-examined the Plaintiff's witnesses, and also examined witnesses of his own ; but did not, by so doing, affect the evidence which has been stated in this report.

The

The cause came on to be heard before the Vice-Chancellor, who dismissed the bill, with costs. (a)

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The Plaintiff now appealed from his Honor's decision.

*The Solicitor-General, Mr. Wakefield, and Mr. Duckworth, for the Plaintiff.*

*Mr. Jacob, Mr. Wigram, and Mr. Loftus Wigram, for the Defendants.*

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*The LORD CHANCELLOR.*

Nov. 5.

The bill seeks a specific performance of a verbal contract for a lease, founded upon part performance. The contract, as stated in the bill, is for a lease for fourteen years, from the 29th of *September* 1825, determinable by either party at the end of the first seven years, upon six months' notice. The rent 120*l.* The lessee well and effectually to drain the lands, and to lay down a piece of arable into pasture, and to put and keep the buildings in good and substantial repair, the landlord finding timber for the tenant.

The tenant's bill has been dismissed, with costs, by the Vice-Chancellor, upon the ground that there was not evidence of a concluded agreement; and, at the bar, it has been contended that the evidence does not prove the agreement as stated in the bill. This is the only question to be inquired into; because, if an agreement be proved, there is no doubt of the part performance. The drainage and the repairs are distinctly proved, and the Defendant, who did not attempt to disprove the fact, has wholly failed in proving the case set up in his answer, of such works having been done at his expense. Of the contract so stated in the bill, there is

(a) A short report of the case will be found in 9 *Sim.* 413.

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is evidence, first, of the Defendant's own memorandum of instructions given by him to his steward in these words:—" *Mundy*, junior, to have a lease for 7-14 years, to be found timber for repairs, and to put down tile and stone drains in all the fields necessary at his own expense; to stand at the present rent." This memorandum is not the agreement itself, or binding upon the tenant; but it is evidence, against the landlord, of what it contained; and it does, in fact, provide for all the terms of the agreement as stated, except as to laying down the piece of arable land. It proves, first, the rent agreed upon; secondly, the term to be fourteen years, determinable at the end of seven, by the words "7-14;" thirdly, that the tenant was to do repairs, by the provision that the landlord was to find timber for that purpose; fourthly, that the tenant was to drain the lands. The bill says, well and effectually, which the landlord considered to be with tile and stone. The next piece of evidence is the draft of a lease, prepared by the steward of the landlord, which includes the provisions as to laying down the arable land into pasture. The next evidence is, the deposition of Mr. *Hector*, who was present when the contract was made between the landlord and the tenant, and which corresponds with the statement in the bill and in the memorandum as to the provisions of the agreement, but is silent as to the provisions for laying down the arable into pasture. Such is the evidence, so far as it relates to the fact of a contract having been entered into, and the terms of it.

As to the grounds upon which the bill was dismissed, namely, that no contract was ever concluded, it is, first, to be observed, that, upon this supposition, Mr. *Hector* must be guilty of the most deliberate perjury, and the landlord must be supposed to have given written instructions to his steward to prepare a lease, specifying the terms, before such terms had been agreed upon, and the

the steward must have prepared the draft of a lease, with very minute stipulations between the landlord and tenant, no such stipulations having been agreed upon; and the tenant must have expended very considerable sums, proved to have been far beyond what a tenant from year to year ever does expend, without any security for the permanence of his tenure.

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Two circumstances are relied upon, in the judgment of the Vice-Chancellor, as shewing that there never was a binding agreement:—First, that the agreement, as stated in the bill, was to drain the lands, and the draft lease provided for draining all and every part of the arable and pasture land; whereas the memorandum of instructions for the steward and the evidence of Mr. *Hector* speak only of draining the farm where necessary: and, secondly, the omission, in the memorandum, and in the evidence of Mr. *Hector*, of the provision as to laying down the arable land into pasture. As to the first, I cannot discover any such discrepancy as to lead to a conclusion that no contract was concluded. An agreement to drain necessarily means to drain where necessary, as an agreement to repair is to repair where repairs are required; and that this was so understood, is exemplified by the act of the steward, who, under instructions to provide for draining in all the fields necessary, inserted a covenant, in the draft lease, for draining all and every part of the arable and pasture land. It is also to be observed, that the Plaintiff, by his bill, states the contract most strongly against himself, and the Defendant has not proved any default in the Plaintiff in not draining according to the contract.

As to the provision for laying down the arable land into pasture, the Vice-Chancellor has suggested that this was probably afterwards thought of by the steward. That may be so; but it was competent to the parties to  
add

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add to or vary the verbal contract; and if this provision were afterwards added and agreed to by the parties, the altered agreement would not be the less binding upon the parties. This supposition, indeed, would explain how the memorandum and the deposition of Mr. *Hector*, who speaks to the meeting between the landlord and the tenant, are silent as to this provision; but the draft lease, being the act of the landlord's agent, is evidence against him; and there is, besides, the fact of the tenant having been at the expense of converting the arable piece of land into pasture,—all which affords evidence of this provision having been part of the ultimate contract; but if there had been no evidence of this, the statement of this provision would be against the tenant, and which it is proved he had performed. It, therefore, would introduce no difficulty in doing justice between the parties. In the case of *Gregory v. Mighell (a)*, the bill alleged, as part of the agreement, that the taxes and necessary repairs were to be borne by the tenant; but this was not noticed by the witness who was present and proved the verbal agreement. Sir *W. Grant* decreed a specific performance upon the grounds, first, that the statement was an admission against the Plaintiff himself; and, secondly, that it was immaterial, the stipulation being for no more than the tenant must have done without it. Both these grounds are to be found in this case. The statement is an admission against the Plaintiff himself, and is immaterial so far as relates to any thing remaining to be done.

The Defendant has endeavoured to set up, as a defence, acts of the tenant which would have been breaches of the covenant, if a lease had been executed. In this I think he has wholly failed; for instance, he charges the  
 tenant

(a) 18 Ves. 328.

tenant with having grubbed up a hedge, and it is proved to have been done with the approbation of his own steward. This ground of defence assumes the existence of the agreement; and if, upon that supposition, the landlord never complained of the conduct of his tenant, but permitted him to act upon the faith of the contract, it would require a strong case to enable the landlord to raise such objections, for the first time, when the tenant claimed the benefit of it.

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In the view I take of the case, it is not necessary to advert further to the answer and to the defence there set up. Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the Plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were. It is not necessary, in this case, to adopt any such course of proceeding; for I think an agreement for a lease sufficiently proved, and that acts of part performance are proved, so as to take the case out of the Statute of Frauds; and I think the defences set up have wholly failed.

It follows that the decree of the Vice-Chancellor must be reversed, and that there must be a decree for a specific performance of the agreement, as stated in the bill, and a reference to settle the lease, if the parties differ about it; and the Defendant must pay the costs of the suit.



1839.

## BETWEEN

HARRIET ELIZABETH MUNCH, since deceased,  
Plaintiff;

## AND

Sir CHARLES COCKERELL, Bart., since deceased,  
HENRY TRAIL, since deceased, ARCHIBALD  
FREDERICK PAXTON, HENRY PAXTON,  
and WILLIAM GILL PAXTON - Defendants,  
By original and amended bill;

## AND BETWEEN

GEORGE REID - - - - - Plaintiff;

## AND

Sir CHARLES COCKERELL, Bart., since deceased,  
HENRY TRAIL, since deceased, ARCHIBALD  
FREDERIC PAXTON, HENRY PAXTON, and  
WILLIAM GILL PAXTON - Defendants,  
By bill of revivor;

## AND BETWEEN

The said GEORGE REID - - - Plaintiff,

## AND

JOHN STUDHOLME BROWNRIGG, JAMES  
COSMO MELVILL, Sir CHARLES COCK-  
ERELL, Bart., since deceased; JOHN COCK-  
ERELL, and JAMES TRAIL HALL  
Defendants,

By bill of of revivor;

## AND BETWEEN

The said GEORGE REID - - - Plaintiff,

## AND

MATTHEW DENZILOE and ELIZABETH  
ANN, his Wife, WILLIAM BEAUFOY LE  
GROS,

GROS, out of the jurisdiction of the Court, 1839.  
 GEORGE WILLIAM HAWES, ANN EVE-  
 LYN, and Sir CHARLES RUSHOUT COCK-  
 ERELL, Bart. - - - Defendants,  
 By bill of supplement and revivor ;

AND BETWEEN

The said GEORGE REID - - - Plaintiff,

AND

LETITIA JANE DENZILOE, an Infant, by her  
 Guardian - - - Defendant,  
 By bill of supplement ;

AND BETWEEN

Sir CHARLES RUSHOUT COCKERELL, Bart.,  
 JOHN STUDHOLME BROWNRIGG, and  
 JAMES COSMO MELVILL - - - Plaintiffs,

AND

The said GEORGE REID, ANN EVELYN,  
 ARCHIBALD FREDERIC PAXTON, HENRY  
 PAXTON, and WILLIAM GILL PAXTON

Defendants, June 5. 7. 8.  
 11. 12.

By cross bill.

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 Jan. 21.

THIS cause came before the Lord Chancellor, upon two appeals—one by Sir *Charles Rushout Cockerell*, Bart., as the executor of Sir *Charles Cockerell*, Bart., deceased; and the other by the executors of *Henry Trail*, deceased—against a decree of the Vice Chancellor, by which it had been, in effect, declared that Sir *Charles Cockerell* and Mr. *Trail*, as trustees of a settlement of the year 1778, were liable to make good to the late Plaintiff, *Harriet Elizabeth Munch*, one moiety of a trust fund of 164,999 sicca rupees. This trust fund arose from a sum of 164,000 sicca rupees, which had been invested upon a Government Note of the *East India Company*, under the control of the house of *Palmer and Co.*, of *Calcutta*, Half of a trust fund held on the trusts of a settlement of 1778 was re-settled by a settlement of 1791. In a suit to administer the trusts of the settlement of 1778, that half was, in the year 1809, ordered to be transferred to the trustees of the settlement of 1791. The

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transfer was never made, nor was it ever applied for by the trustees of the settlement of 1791. In 1827 the parties beneficially entitled under the settlement of 1791 were adult and *sui juris*. The then present investment of the trust fund was, as it had for many years before been, an investment in *India*, subject to the control of the trustees of 1778, but those trustees were and had long been in *England*. The parties so beneficially entitled knew of and acquiesced in the investment,

and never required that their half of the fund should be transferred to the trustees of 1791. The trust fund was afterwards lost by the failure, in 1830, of a house of business in *India*. Held that the parties beneficially entitled were precluded from insisting that the trustees of 1778 were liable to make good the loss by reason of their not having made the transfer to the trustees of 1791.

Trustees in *England* held liable for the loss of a balance of money which they knew to be in the hands of a house of business in *India*, and not invested upon proper securities, although the *cestuis que trust* had consented that the house in *India* should have the management of their affairs there; for it did not appear that the *cestuis que trust* knew that the balance, instead of being properly invested, remained in the hands of the house in *India*.

Distinction between the degree of knowledge and sanction necessary to exonerate trustees from a breach of trust, and that which is necessary to preclude the *cestuis que trust* from complaining of an omission which, if concurred in by the *cestuis que trust*, did not constitute a breach of trust.

*Calcutta*, and which had been paid off by the *East India* Company in the year 1823, when *Palmer* and Co. took a new note from the *East India* Company for 114,800 sicca rupees, but retained the remaining 49,200 sicca rupees as a cash balance in their hands; and they not only never invested that cash balance, but they, subsequently, at some time before the 4th of *January* 1830, converted into money the note for the 114,800 sicca rupees, and appropriated the produce of such conversion to their own use; and on the 4th of *January* 1830, they stopped payment, and subsequently were declared insolvent. The cash balance then in their hands upon the trust account amounted to nearly 50,200 sicca rupees, so that the whole amount of the fund in question in this cause was 164,999 sicca rupees, of which one moiety was 82,499 sicca rupees.

The case is reported in the eighth and ninth volumes of *Mr. Simons's Reports* (a); first, on a preliminary objection for want of parties, and, secondly, on the hearing of the cause.

The substance of the case was this:—

The 164,999 sicca rupees were part of a trust fund,

(a) 8 *Sim.* 219., 9 *Sim.* 539.

fund, subject to the trusts of a settlement of 1778, which authorized the investment of the trust funds upon the paper of the *East India Company*; and the whole beneficial interest in that trust fund became vested, under the settlement of 1778, in *Harriet Barton*, afterwards *Silberschildt*, and *Elizabeth Barton*, afterwards *Le Gros*, subject to the previous successive life interests of their parents, *William Barton*, and *Harriet* his wife. [The particular terms of this settlement will be found to be more fully stated by the Lord Chancellor: see *post*, p. 210.]

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In the year 1791, on the marriage of *Harriet Barton* with *Jacob Frederic Silberschildt*, her share of the trust funds of 1778 was assigned to *Archibald Paxton*, *Sir William Paxton*, and *John Le Gros*, as trustees for investment in such securities, except private personal security, as *Silberschildt* and wife, or the survivor of them, or as *Archibald Paxton*, *Sir William Paxton*, and *John Le Gros*, or the survivors or survivor of them, after the decease of *Silberschildt* and wife, should think fit; to be held upon trust for *Silberschildt* and wife, successively, for their lives, and, after their deaths, for their children equally.

*Elizabeth Barton* married *William Le Gros*, and they had a son, *William Beaufoy Le Gros*; but it did not appear whether any settlement of their share of the trust property of 1778 was made on their marriage.

One moiety of the 164,999 *Sicca* rupees, now in question, was comprised in the settlement of 1791.

In the year 1792, *Sir Charles Cockerell*, *Henry Trail*, and *William Logan*, were appointed trustees of the settlement of 1778, jointly with *John Evelyn*, a continuing trustee of that settlement.

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In the year 1799, *William Barton* died; and, soon after his death, his widow, *Harriet*, married *Thomas Butler Eyles*.

There were five children of the marriage of Mr. and Mrs. *Silberschildt*, but two only lived to attain vested interests in the property comprised in the settlement of 1791, viz.: *Harriet Elizabeth* and *Mary Elizabeth*. *Harriet Elizabeth* married *Hans Frederick Munch*, and she was the original Plaintiff in this cause. *Mary Elizabeth* died, unmarried, in the year 1830.

Previously to the settlement of 1778 a settlement of 1774 existed, for which the settlement of 1778 was substituted.

In the year 1802, *Eyles* and wife instituted a suit, which will be called, in this report, *Eyles v. Evelyn*, in the Court of Chancery in *England*, against *Evelyn*, Sir *C. Cockerell*, *Trail*, *Logan*, and *William Le Gros* and wife, and *William Beaufoy Le Gros*, their son, and *Silberschildt* and wife and their children, praying that the trusts of the settlements of 1774 and 1778 might be carried into execution, and that an account of the property comprised in them might be taken.

In the year 1804, a decree was made, in *Eyles v. Evelyn*, directing inquiries as to the trust funds comprised in the settlement of 1778, and as to the children of *Barton* and wife, *Silberschildt* and wife, and *William Le Gros* and wife.

At a subsequent period of the year 1804, Mrs. *Silberschildt* died; and in the year 1805 Mrs. *Eyles* died, and her husband *Thomas B. Eyles* became her administrator, and he filed a bill of revivor and supplement, upon which a supplemental decree was made.

In

In or about the year 1809 *Logan* died.

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In *March* 1809, the Master's report in *Eyles v. Evelyn* was made, finding that the trust property comprised in the settlement of 1778 consisted of 4000*l.* consols then standing in the names of *Archibald Paxton*, *Sir William Paxton*, and *Sir C. Cockerell* (a), and of a large amount of sicca rupees, which had been, from time to time, invested and re-invested in bonds and notes of the *East India Company*.

In the same month of *March* 1809, the Master made a separate report, finding that the settlement of 1791 had been executed, and that it was a proper settlement. (b)

The cause of *Eyles v. Evelyn* was heard for further directions on the 19th of *June* 1809, when a decretal order was made, declaring that *T. B. Eyles*, in right of his late wife, was entitled to the interest of the trust property mentioned in the report, from the time of *William Barton's* death to the day of *Mrs. Eyles's* death, and that *Elizabeth Le Gros* became, upon *William Barton's* death, entitled to one moiety of the principal of the same trust property, subject to *Mrs. Eyles's* life interest, and that the other moiety, at the same time, became vested, subject to *Mrs. Eyles's* life interest, in *Archibald Paxton* and *Sir William Paxton*, upon the trusts of the settlement of 1791; and it was ordered that *Archibald Paxton*, *Sir William Paxton*, and *Sir Charles Cockerell* should sell part of the 4000*l.* consols, to pay costs; and that the interest accrued upon the trust property comprised in the settlement

(a) It did not appear how these three names became united as trustees of this sum.

this separate report was made in pursuance of any special order for the purpose.

(b) It did not appear whether

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ment of 1778, since the death of Mrs. *Eyles*, should be paid to *William Le Gros* and *J. F. Silberschildt* in equal moieties; and that the moiety of *Elizabeth Le Gros* of the principal of such trust property, after payment of a proportion of the costs, should be subject to the further order of the Court, without prejudice to any claim of *William Beaufoy Le Gros*; and that the remaining moiety of the principal of the same trust property, after payment of a proportion of the costs, should be transferred and paid over to *Archibald Paxton* and Sir *William Paxton*, upon the trusts of the settlement of 1791.

In pursuance of this order on further directions, 1050*l.* consols was sold to pay costs, which reduced the 4000*l.* consols to 2950*l.* consols.

One moiety of the fund of sicca rupees, to which the present appeals related, might have been transferred by Sir *C. Cockerell* and Mr. *Trail* to *Archibald Paxton* and Sir *William Paxton*, under the last-mentioned order, as trustees of the settlement of 1791; but the whole fund continued, from the year 1809 until the misappropriations before-mentioned, to be under the management of *Palmer and Co. of Calcutta*, or their predecessors in business in *Calcutta*; and the house in *Calcutta* from time to time transmitted to a house of business in *London*, in which Sir *C. Cockerell* and Mr. *Trail* were partners under several successive firms, annual accounts of the investments of and dealings with the fund; and the house in *Calcutta* also, from time to time, remitted to the house in *London* the interest of the fund; and such interest was, from time to time, paid by the *London* house to the parties beneficially entitled to it.

The account so transmitted to the *London* house shewed that, upon the occasion of the *East India Company's* note for 164,000 sicca rupees being paid off in  
the

the year 1823, as before mentioned, the amount of 114,800 sicca rupees was re-invested, and that the remaining 49,200 sicca rupees remained as a cash balance due from *Palmer and Co.*; and the accounts also shewed the amount of that cash balance from time to time.

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The course of dealing with the Company's notes is stated in the Lord Chancellor's judgment.

In the year 1813, the Plaintiff *Harriet Elizabeth Munch* (then *Silberschildt*), came of age. In the year 1816, *Mary Elizabeth Silberschildt* came of age. In the same year *Harriet Elizabeth* married *Hans Frederick Munch*.

On the 8th of November, 1820, *J. F. Silberschildt*, *H. F. Munch* and *Harriet Elizabeth Munch* his wife, and her sister *Mary Elizabeth Silberschildt* filed a bill in the *English Court of Chancery* which will be called, in this report, *Silberschildt v. Paxton*, and which, as amended, was against Sir *W. Paxton*, Sir *C. Cockerell* and *Trail*, stating that, in *June* 1811, the 164,000 sic. rup. were placed out by Sir *C. Cockerell* and *Trail* in their own names upon a note of the *Bengal* government, dated the 30th of *June*, 1811, carrying interest at 6*l.* per cent., and that that note was held by them upon the trusts of the settlements of 1774 and 1778, and was still in their possession, and stating that *Silberschildt* was entitled, for his life, to a moiety of the interest of the 164,000 sic. rup., and that, under the settlement of 1791, *Harriet Elizabeth Munch* and *Mary Elizabeth Silberschildt* would become entitled to a moiety of the 164,000 sic. rup.; and praying that an account might be taken of the receipts and payments of Sir *C. Cockerell* and *Trail* in respect of the yearly interest of the moiety, and that they might be decreed to pay what should appear to be due from them in respect of such receipts and payments.



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To this bill, and to its amendments, Sir *W. Paxton*, Sir *C. Cockerell* and *Trail* put in answers, stating, that having been, for many years then last, resident in this country, and having carried on business in co-partnership together with other persons in *London*, the management of the trust funds had been entrusted by them to their correspondents at *Calcutta*, who had, from time to time, received the proceeds and remitted them to the house of the Defendants, Sir *W. Paxton*, Sir *C. Cockerell* and *Trail*, and their co-partners for the time being, to be applied for the benefit of the parties interested; and that it appeared, by the accounts transmitted by Messrs. *Palmer & Co.* of *Calcutta*, their correspondents, and which they believed to be correct, that the 164,000 sic. rup. were invested on the note of the 30th of *June*, 1811: and they stated that that investment was made on the account, and in the names of Sir *C. Cockerell* and *Trail*, and the other trustees of the fund, or in the names of *Palmer & Co.* on their behalf, and that the note was then held by or on behalf of Sir *C. Cockerell*, *Trail* and *Evelyn*, upon the trusts of the settlements of 1774 and 1778.

In the year 1823, *Hans Frederick Munch* died. In *Michaelmas* term, 1825, and *Trinity* term, 1826, a replication was filed and subpoenas to rejoin were served, in *Silberschildt v. Paxton*.

On the 15th of *August* 1827, *J. F. Silberschildt*, who was then resident in *England*, died. At this time the Plaintiff, *Harriet Elizabeth Munch*, was of age and a widow, and her sister, *Mary Elizabeth Silberschildt*, was of age and unmarried. The Plaintiff and her sister lived at *Copenhagen*.

In the month of *November* 1827, *Evelyn* died.

The

The suit of *Silberschildt v. Paxton* had been instituted upon the instructions of *J. F. Silberschildt* only : but, in or after *October* 1828, *Mrs. Munch* and her sister, as the surviving Plaintiffs in that suit, dismissed it, with costs.

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Between the time of *J. F. Silberschildt's* death and the failure of *Palmer* and *Co.*, a good deal of correspondence passed between *Mrs. Munch* and her sister and their agents in *England* on the one hand, and the *London* house, in which *Sir C. Cockerell* and *Mr. Trail* were partners, on the other, relative to the investment of the trust property to which *Mrs. Munch* and her sister were entitled under the settlement of 1791 ; and, on the 8th of *January* 1830, two deeds of release, after stated, from the agents of *Mrs. Munch* and her sister in *England*, to the *London* house, in which *Sir C. Cockerell* and *Mr. Trail* were partners, were executed ; but it was then unknown to any of the parties that, four days before the date of that release, the house of *Palmer* and *Co.* had stopped payment at *Calcutta*.

As a considerable portion of the Lord Chancellor's judgment in this case relates to the question whether it was the duty of *Sir C. Cockerell* and *Mr. Trail*, as trustees of the settlement of 1778, to put the whole of the trust property comprised in the settlement of 1791 into the hands of *Archibald Paxton* and *Sir William Paxton*, as trustees of the last-mentioned settlement, and to the question whether that duty, if any, was affected by the knowledge and consent of *Mrs. Munch* and her sister as to their trust funds remaining in the hands in which they already were, it seems desirable to state those parts of the correspondence, on these points, which are particularly alluded to in the Lord Chancellor's judgment. In order to make that correspondence intelligible, it is necessary to state that *Mr. Holt* was the solicitor, in *London*, of *J. F. Silberschildt* to the time of

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his death ; and that the Plaintiff and her sister, after *J. F. Silberschildt's* death, employed the mercantile house of Messrs. *Reid, Irving, and Co.*, as their agents in *England* ; and that Messrs. *Freshfield and Son* acted as the solicitors, in *England*, of the Plaintiff and her sister, employed for that purpose by Messrs. *Reid, Irving, and Co.* ; and that Mr. *Ryan of Copenhagen* was the correspondent there of *Reid, Irving, and Co.*

On the 17th of *August* 1827, Mr. *Holt* wrote to Mrs. *Munch* a letter partly as follows : —

“ Madam,

“ Previously to the perusal of this letter, Mr. *C. W. Printzlaw* will, at my request, have verbally communicated to you the melancholy intelligence of the decease of your father Colonel *Silberschildt*, and have detailed all the circumstances attending it. As the confidential solicitor of my departed friend, and in possession of the state of his affairs, there is a duty which devolves upon me to look to the interest of his family, and from the particular position in which those matters at present stand, I feel it hardly necessary to apologise for pressing upon your mind with business, distressed as it must naturally be. I therefore at once enter upon a short statement of the property to which yourself and your sister Miss *Mary Elizabeth Silberschildt* now become entitled.

“ By a deed of settlement, dated 8th of *April* 1791, executed on the marriage of your father and mother, you and your sister now become entitled to a sum of 3000*l.* 3 per cent. consols, standing in the Bank books to the credit of the executors of the survivor of the trustees named in that deed, also to a moiety of 164,000 sicca rupees now invested in *Bengal* government notes, and a moiety of 2950*l.* like consols, which latter sums  
 stand

stand in the names of most responsible persons as trustees, and are subject to administration under the deed of 1791. You are likewise entitled to one third part of an estate in *Lancashire*, producing an annual rental of about 90*l.*, the particulars of which must be subject to further correspondence. In order, however, to satisfy the minds of the trustees of the above-mentioned stock and *India* securities, before they will take any steps towards putting you in possession, it will be necessary to lay before their solicitor the following evidence."

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[Then followed a statement of the evidence required.]

"The suits which have been in prosecution and pending at his death are, first, against the executors of his late brother-in-law Mr. *William Le Gros*, to investigate his accounts as agent for your father in this country."

[The particulars of which seem to be immaterial for the present purpose.]

"Secondly, against the partners in the firm of *Paxton and Co. (a)*, calling upon them to give the account of the trust funds in *India*, and the securities upon which they were invested; and also to render an account of the remittances from *India*, and accumulations of interest thereon from the month of *May* 1805 (the time of the decease of Mrs. *Eyles*, formerly Mrs. *Barton*), down to the time when such suit was instituted. This suit had in view to discover, in the first place, whether that house had duly accounted to Mr. *Le Gros*, and as a check upon

(a) The *London* house in which Sir *C. Cockerell* and Mr. *Trail* were partners.

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upon Mr. *Le Gros's* accounts with Colonel *Silberschildt* \* \* \*."

"The third subject of litigation is against the partners in the house of *Cockerell, Trail*, and Co., who have for many years received the rents of the *Lancashire* estate; they being in possession under the authority of Mr. *Barton* in his lifetime \* \* \*."

"If it be the determination of yourself and your sister who (subject to Colonel *Silberschildt's* just debts) would become entitled to such moneys as may ultimately arise from these law proceedings, I should be furnished without delay with a letter signed by yourself and sister, authorizing me to revive the proceedings in these suits, which have abated with the death \* \* \*."

On the 6th of *November* 1827, Mrs. *Munch* wrote to the *London* house, in which Sir C. *Cockerell* and Mr. *Trail* were partners, as follows:—

"6th of *November* 1827.

"174. *Bregaaden, Copenhagen.*

"Messrs. *Paxton, Cockerell, Trail*, and Co.

"Gentlemen,—Supposing you to be acquainted with the death of my late father, who enjoyed a life-rent of the capital in *India*, for which you are trustees in *England*, and from whom my late father received his half-yearly payments as well upon that capital as the money in the Bank; do I take the liberty, in my sister's and my own name, to address you. We being the only heirs now alive, do we request you to have the goodness to point out to us, what if any measures are to be taken besides the evidences we have already procured, and which are to be sent to your house to enable us to receive the dividends. For whatever you may deem needful and have the

the goodness to do in forwarding this purpose we will be greatly obliged. As the business has so long been transacted by your house, it is the wish of my sister and myself that the whole capital may still remain in the same respectable hands. Were it not taking too much liberty with your house, which my sister's and my situation only can plead an excuse for, I would request the favour that I might, through your means, obtain my deceased father's papers and effects which are now under seal in the possession of *William Holt, Esq., 37. Threadneedle Street.* The seal he has sent here to me. For the trouble this would give you, be assured I would ever feel most grateful. In the hopes to hear from your house with convenient opportunity, I remain with due respect, gentlemen, your very humble servant, *Harriet Munch.*"

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On the 5th of *February* 1828, Mrs. *Munch* wrote again to the *London* house, in which Sir *C. Cockerell* and Mr. *Trail* were partners, as follows : —

" *Copenhagen, 5th February 1828.*

" Gentlemen, — I took the liberty to address a letter to your house, dated the 6th of *November* last, respecting my late father's death, and the property in consequence thereof devolving to my sister and myself, requesting your advice as to what documents were necessary to be forwarded by us to enable us to come in possession of that property, to which letter I have had no answer, but have learned, by other means, that you waited for these documents being transmitted to *England* ere you could reply.

" I have now to inform you that all these certificates, and what has been deemed here necessary for accomplishing the above purpose, have been sent off by this post, accompanied by two power of attorneys, one from  
me

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me and one from my sister, each in favour of Messrs. *Reid, Irving, and Co.*, by which you will perceive that we have only authorized those gentlemen to receive the rents, dividends &c., as they may fall due, it being our wish that the capital may remain in the same situation and under that management, which has for so many years regularly discharged it, and which we hope and beg you will continue to do for us as formerly.

“As to what may be proper to be done in regard to transferring the property into our names, we mean to follow the advice you may find proper to give us.

“Notwithstanding we are acquainted so far with the nature of the property coming to us, yet we are ignorant of the times and amounts of the different payments as they become due, of which we will beg the favour of your information. In the hopes soon to hear from you, we remain, with due regards, gentlemen, yours, &c.

“*Harriet Munch*, and

“*Mary Silberschildt*.

“To Messrs. *Paxton, Cockerell, Trail, and Co.*”

On the 20th of *May* 1828, Mr. *Holt* wrote to *Reid, Irving, and Co.*, as follows:—

“Such of the documents which you handed to me on the 13th of *March* as I considered material to prove that Mrs. *Munch* and Miss *Silberschildt*, the parties who have executed powers in your favour, were the only surviving children of the late Colonel *Silberschildt*, have been submitted to the solicitors for the trustees, and I have at length obtained an answer, ‘that the evidence is satisfactory.’ Having this admission, I  
 presented

presented the powers of attorney, and requested an account of the interest which had accrued since the death of Colonel *Silberschildt* on the funds in *India*, in order that it might be paid to you, together with a half year's dividend on the 3000*l.* three per cent. consols, and a like dividend on a moiety of the 2950*l.*, like three per cents., which became due in *January* last; but Mr. *Hall* objects to see his clients acting on any new trust until they are formally released by Mrs. *Munch* and Miss *Silberschildt*, and a legal personal representative of Colonel *Silberschildt* by letters of administration, in respect of the trusts created by the marriage settlement of the 8th *April* 1791, the trusts of which terminated with his life. This being done, the trustees will transfer into the names of Mrs. *Munch* and Miss *Silberschildt* the 3000*l.* and a moiety of the 2950*l.* above mentioned, or a half into each name, as they may direct, which (in answer to Mr. *Haagen's* question on that point) will leave these funds subject to the sole control and disposal of the ladies, and not liable to be drawn out by any other person. As to the 164,000 sicca rupees in *India*, Messrs. *Palmer* and Co., of *Calcutta*, will have no objection to continue its management, and, as heretofore, to remit the interest through Messrs. *Cockerell*, *Trail*, and Co., to be paid in *London* under the powers which have been executed; but it is my duty here to point out to the ladies that they will no longer have the security of the trustees by whom the investment was made, and who now ask to be released from further personal responsibility, the object of the original trust being performed and at an end.

“ It now remains with Mrs. *Munch* and Miss *Silberschildt* to say whether they will constitute Messrs. *Palmer* and Co. their agents for the purpose I have mentioned, or have the securities sold and the proceeds remitted to them;

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them; and until they have so determined, Mr. *Hall* cannot prepare the formal release which he will require to be executed by them, and an administrator when appointed. I need scarcely mention that, as regards the *Lancashire* estate and accumulation of rents, the trustees do not ask for a release, because they will insist that they are entitled to the indemnity of the Court when a right to that property has been properly established; and I am much surprised that this matter has been permitted thus to slumber for so long an interval."

On the 20th of *October* 1828, Mr. *Holt* wrote to Messrs. *Hall* and *Brownley*, the solicitors of Sir C. *Cockerell*, as follows:—

"Messrs. *Reid, Irving*, and Co. request me to say that, for the present, they should prefer having the *Indian* securities belonging to Mrs. *Munch* and Miss *Silberschildt* transferred into their (*Reid, Irving*, and Co.'s) names. I shall be obliged by your stating your views as to the best mode of making this disposition, and by furnishing me with the draft of such release as you may require as to the securities I have mentioned, as well as to a moiety of the 2950*l.* consols. I mentioned on *Saturday* that the stop at the Bank on the 3000*l.* had been removed, and expected to have received this morning the ingrossments of the releases, as well as your assent to Messrs. *Cockerell, Trail*, and Co. paying my draft for the balance of the account which I agreed with Messrs. *Freshfield* and Son."

On the 16th of *October* 1829, *Freshfield* and Son wrote to *Reid, Irving*, and Co. as follows:—

"It is now become necessary to consider what shall be done with the *Indian* securities belonging to Mrs. *Munch* and Miss *Silberschildt*. At present, as you are  
 aware,

aware, the securities are in the hands of Messrs. *Palmer* and Co. of *Calcutta*, as the agents of the trustees; but as they are now to become the property of Mrs. *Munch* and Miss *Silberschildt*, an arrangement must be made for their being delivered over to the agents of these ladies, unless they prefer that the securities shall remain with Messrs. *Palmer* and Co., as their agents, rather than have them delivered to any other house. If Mrs. *Munch* and Miss *Silberschildt* wish to have the securities delivered to any other house, a power of attorney must be sent out to enable the firm to give Messrs. *Palmer* and Co. proper discharges; and we must, in that case, trouble you to furnish us with the names of the partners composing the firm; but if the ladies determine that the securities shall remain with Messrs. *Palmer* and Co., we will procure an authority from the trustees here to those gentlemen to hold the securities at the disposal of Mrs. *Munch* and Miss *Silberschildt*; and if Messrs. *Palmer* and Co. addressed a letter to the ladies, stating that they do hold them at their disposal, a power of attorney will not then be necessary. We have, therefore, to request the favour of your instructions as to the course the ladies will prefer, in order that, if necessary, we may prepare a proper power of attorney."

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On the same day, *Reid, Irving*, and Co. wrote thus to Mr. *Ryan* of *Copenhagen*: —

"*London*, 16th *October* 1829.

"Mrs. *Munch*'s affairs have been delayed latterly by the desire of our solicitors to effect a compromise of the interest claimed by her father's estate; and they have hopes of effecting this if a little time be given. In the meantime we annex the copy of a letter from them requiring instructions as to the principal moneys in the  
 hands

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hands of Messrs. *Palmer* and Co. On this point the ladies must decide for themselves. We have no house to recommend in *Calcutta*, and we believe Messrs. *Palmer* and Co. to be of the first rank.

“We are, &c.

“*Reid, Irving, and Co.*

“*G. Ryan, Esq., Copenhagen.*”

On the 19th of *October* 1829, *Freshfield* and Son wrote to Mr. *Holt*, —

“In reply to your application of this morning, we beg to inform you that we did call on Messrs. *Reid, Irving, and Co.* on *Friday* last, for the purpose of learning the name of an agent to be inserted in the power of attorney; but in consequence of its not being determined how the fund in *India* shall be disposed of, Messrs. *Reid, Irving, and Co.* could not enable us to proceed, without first writing to the ladies; and we believe that they did this by the post of *Friday* last. It is possible that a power of attorney may not be necessary at all; but so soon as we hear from Messrs. *Reid, Irving, and Co.*, we will communicate with you, and use every exertion to settle the business.”

On the 27th of *October* 1829, Mr. *Ryan* of *Copenhagen* wrote to *Reid, Irving, and Co.*, —

“Your esteemed favour of the 16th instant is to hand, and I lost no time in laying Messrs. *Freshfield* and Son’s letter before Mrs. *Munch* and Miss *Silberschildt*, and you have, annexed, translations of a communication they have made to me, by which you will find they agree to leave their *East India* securities in Messrs. *Palmer* and Co.’s hands, so that I hope now matters will soon be arranged; and pray get or give me an  
 answer

answer respecting the other points of their letter to me. They are much in want of funds ; and I hope you may be able soon to authorize their drawing for the interest due on the *East India* stock, &c."

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[The translations alluded to above were as follows.]

"The ladies are determined, with reference to their former orders, not to make any change with the funds in *Bengal*, but wish Messrs. *Palmer* and Co., as their agents, to receive the annual interest and remit it to Messrs. *Reid, Irving*, and Co. The ladies expect the promised letter from Messrs. *Palmer* and Co. respecting the above funds. The ladies wish to know what amount they may now draw for interest due on the *Bengal* funds, and for that part of the said funds of which their share is about 1450*l.*, which was removed to *England* a long time back ; also for that part of the receipts from the *Lancashire* estate, which having been lying as a deposit for many years in the hands of Messrs. *Paxton* and Co., and which now probably amount to some thousands sterling ; and, lastly, for the third share of the yearly rent from said estate, which belongs to the ladies, independent of the suit now pending. The ladies wish to be informed by Messrs. *Freshfield* how far the said suit is advanced, and upon what it turns. An answer is requested as soon as possible."

On the 2d of *November* 1829, *Freshfield* and Son wrote to *Reid, Irving*, and Co., —

"We beg to inform you, that we have received a note from Mr. *Holt*, informing us that there is a cash balance in the hands of Messrs. *Cockerell, Trail*, and Co. of 535*l.* 1*s.* 4*d.* which may be received by you for account of Mrs. *Munch* and Miss *Silberschildt*. Have  
you

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you heard from these ladies respecting the disposal of the securities in *India*?"

On the 12th of *November* 1829, *Freshfield* and Son wrote to Mr. *Holt*, —

"Mrs. *Munch* and Miss *Silberschildt* prefer that the funds in *India* shall remain under the management of Messrs. *Palmer* and Co.; and we shall therefore be prepared to go through the draft with you, and make arrangements for settling the business at any time that may be convenient to you; and we will attend any appointment you may make for the purpose. We have received several enquiries from the ladies, which we shall not be able to answer without your assistance."

By a deed poll, executed by *Reid, Irving*, and Co., on behalf of the Plaintiff and her sister, and dated the 8th of *January* 1830, and purporting to be made by the Plaintiff and her sister, and by Mr. *Holt* as personal representative of their father, and by the executors of Sir *W. Paxton*, reciting, that the Plaintiff and her sister had applied to *Evelyn*, Sir *Charles Cockerell*, and *Trail* to transfer and pay, or cause, or order, or direct to be transferred and paid to the Plaintiff and her sister, or their respective attorneys, or some or one of them for their respective use, and in equal shares, one moiety as well of the sum of 165,000 sicca rupees, or other sum or sums, or securities which then, or at the time of such transfer and payment, should comprise the *India* trust fund, under the care of Messrs. *Palmer*, as also of the sum of 2950*l.* Bank 3 per cent. annuities, and of all dividends, interest, profits, and proceeds, which since the death of *Jacob Frederick Silberschildt* had arisen, or should arise thereupon respectively, and reciting further, that Sir *Charles Cockerell*

*erell* and *Trail* had accordingly, with the privity and assent as well of *Archibald Frederick Paxton*, *Henry Paxton*, and *William Gill Paxton*, the acting executors of Sir *William Paxton*, the surviving trustee of the settlement of 1791, as of *William Holt* as the personal representative of *Jacob Frederick Silberschildt*, at or before the execution of the present deed, made or caused, or ordered and directed to be made such several transfers and payments, (as the Plaintiff and her sister respectively declared,) it was witnessed, that, in consideration of such several transfers and payments so made, or caused, or ordered and directed to be made by *Evelyn*, Sir *Charles Cockerell*, and *Trail*, upon such request, and with such privity as before-mentioned, the Plaintiff and her sister, by and with the privity and assent of the person and persons executing the present deed, released as well *Evelyn*, Sir *Charles Cockerell*, and *Trail*, as all other persons who were, or should, or might be the personal representatives of *Archibald Paxton*, Sir *William Paxton*, and *John Le Gros* deceased, and every of them, from the before-mentioned sums and securities so transferred and paid, or ordered and directed to be transferred and paid as thereinbefore mentioned, and from all part or share of the same under the several thereinbefore recited indentures and proceedings, or any of them, in any wise howsoever, and from all claims of the Plaintiff against *Evelyn*, Sir *C. Cockerell*, and *Trail*, or any of them, or the executors or personal representatives of *Archibald Paxton*, Sir *W. Paxton*, and *John Le Gros*, or any of them, in respect of the several funds, securities, and money so transferred and paid, or ordered and directed so to be, or under the thereinbefore in part recited indenture and proceedings, or any of them, or for or in respect of any account, matter or thing relating thereto respectively.

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Another deed poll of the same date was also executed by *Reid, Irving, and Co.*, purporting to be made by *Mary Elizabeth Silberschildt* and the Plaintiff, and *Holt, and Paxton's* executors, and was, in all respects, similar to the deed poll already stated.

At the end of the month of *January* 1830, *Mary Elizabeth Silberschildt* died, having appointed her sister *Mrs. Munch* her sole executrix.

The original bill in this cause was filed in the year 1831, and was amended in the year 1834, and, as so amended, was a bill by *Mrs. Munch*, in her own right, and as executrix of her sister, against *Sir C. Cockerell, Trail, and the executors of Sir W. Paxton*, who had survived his co-trustee *Archibald Paxton*; and it prayed a declaration, that the release of the 8th of *January* 1830, did not operate as a bar to prevent the Plaintiff from recovering the shares of herself and her sister, in that part of the trust funds which remained under the control of *Palmer and Co.*, and that, if necessary, the release might be declared fraudulent and void, as against the Plaintiff and her sister; and that the Defendants might be declared liable to pay and make good to the Plaintiff, in her own right and as personal representative of her sister, the shares of the Plaintiff and her sister in the 165,000 (a) sicca rupees, or such other amount as was remaining in the hands of *Palmer and Co.* with the interest thereon; and that the Defendants might be decreed to make such payment accordingly, and that, if necessary, an account might be taken to ascertain the amount to be so paid.

The Defendant, *Sir C. Cockerell*, by his answer, stated, amongst other things, that *Archibald Paxton* and *Sir W. Paxton*

(a) 164,999.

*W. Paxton* did not take any steps for the purpose of obtaining a transfer to themselves of that moiety of the trust funds which was comprised in the settlement of 1791.

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Before the cause came on to be heard, the Plaintiff died; and the suit was revived by Mr. *George Reid*, who had become the legal personal representative of Mrs. *Munch* and her sister.

The Defendant *Trail* afterwards died; and another bill of revivor was filed to bring his personal representatives before the Court.

In consequence of the objection taken for want of parties, as reported in the 8th vol. of Mr. *Simons's Reports* (a), a bill of supplement and revivor was filed, for the double purpose of bringing before the Court the *Le Gros* family, and a trustee for them, and the representatives of *Evelyn* and *Logan*, and of reviving the suit against Sir *Charles Rushout Cockerell*, as executor of his father Sir *Charles Cockerell*. In fact, no new party was added as representative of *Logan*, for Sir *C. Cockerell* had been, at the time of his death, *Logan's* surviving executor, and Sir *C. R. Cockerell*, therefore, now succeeded him as *Logan's* personal representative.

Another supplemental bill was filed, to bring before the Court a child born to one of the daughters of the *Le Gros* family.

A cross bill also was filed, by Sir *C. R. Cockerell* and the personal representatives of *Trail*, against the Plaintiff *Reid*, and the legal personal representatives of



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of *Evelyn* and Sir *W. Paxton*, praying, in substance, that the releases might be considered a bar to the claims set up by Mrs. *Munch* and her sister, and that it might be declared that she was not entitled to the relief prayed by her bill, and, at all events, that the parties who should be declared liable for the shares of Mrs. *Munch* and her sister, of the funds in the hands of *Palmer* and Co., might have the benefit of a proportionate part of a proof alleged to have been made against *Palmer* and Co.'s estate.

All these causes came on to be heard together, with evidence and admissions both in the original and cross causes. Amongst the admissions in the original causes was the following, — viz. "That in the year 1810, the *East India* Company authorized their accountant-general and sub-treasurer at *Calcutta* for the time being to receive, in deposit, bonds or promissory notes of the Company belonging to absentee holders, according to certain published regulations; but that, previously to that year, such bonds or notes could not be deposited by the holders thereof, otherwise than in the custody of private agents."

The Vice Chancellor having made the decree reported in the 9th volume of *Mr. Simons's Reports*, Sir *C. R. Cockerell* and the personal representatives of *Trail* presented the present petitions of appeal against the whole decree.

*Mr. Knight Bruce*, *Mr. Richards*, and *Mr. Loftus Wigram*, for the Plaintiff [*i. e.* Mrs. *Munch* and her administrator *Reid*].

*Mr. Walker*, for the *Le Gros* family.

*Mr. Jacob* and *Mr. Cockerell*, for Sir *C. R. Cockerell*.

*Mr. Wigram*

Mr. *Wigram* and Mr. *Sharpe*, for *Trail's* representatives.

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Mr. *F. J. Hall*, for the representatives of Sir *W. Parton*.

Sir *W. Horne* and Mr. *Shadwell*, for the representatives of *Evelyn*.

The effect of the arguments appears in the judgment.

*The* LORD CHANCELLOR.

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The Vice Chancellor's decree declares Sir *C. Cockerell* and Mr. *Trail* liable to the Plaintiff for the value of 82,499 sicca rupees on the 31st of *October* 1828, being half of 164,999 sicca rupees, the amount of the trust fund on that day. The statement in the bill is, that before *May* 1823, the trust fund was invested in a Government Note of the *East India Company* for 164,000 sicca rupees, which was, on the 31st of *May* 1823, paid off, and part of the sum received immediately reinvested in another Government Note for 114,800 sicca rupees, and that the balance remained, as a cash balance, from that time, in the hands of Messrs. *Palmer & Co.* The 165,000 sicca rupees, with which the decree charges Sir *C. Cockerell* and Mr. *Trail*, appears to be composed of the amount of this note for 114,800 sicca rupees and 50,200 sicca rupees, the cash balance in 1828.

I propose to consider the Plaintiff's claim to the value of the note and to the cash balance separately ; and, first, as to the note. Upon this subject, three points are to be considered : — 1st. Whether the investment in the note in question was unauthorized by the trust deed, and is, therefore, a breach of trust ? 2dly. If the investment

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was not of itself a breach of trust, whether there was such negligence, on the part of the trustees, in the manner in which the trust was executed, as to subject them to the loss which arose from the improper use of the note by the agents, *Palmer & Co.*? 3rdly. Whether the decree of 1809 imposed upon them a new liability, in respect of which they are liable for the alleged consequences of the provisions of that decree not having been carried into execution?

I propose to consider this third point first, because it is the ground of the Vice Chancellor's judgment, and, in the view taken of it by his Honour, excludes the necessity of considering the other two. In the judgment of the 22d of *December* 1838 (a), his Honour says, "It appears to me that the ordering part of the decree of 1809 made it quite unnecessary to enter into the question which was much discussed, namely, what was the sort of investment in *India* which the trustees were at liberty to make under the directions which were contained in the deeds of 1774 and 1778." And again: "It seems to me that originally Messrs. *Cockerell* and *Trail* acted wrongly in not making the transfer which was directed by the decree of 1809;" and, in speaking of Mr. *Logan*, who died in 1809, soon after the decree, he says, "It would be extremely unjust to say that he shall be made responsible for all that was consequent upon the decree of 1809, for the only liability he could have come under, would have been the non-compliance with that decree;" and, accordingly, no decree was made against his estate, although he was one of the trustees of the deed of 1778 up to the time of his death in 1809, and would have been equally liable as the other trustees, Sir

*C. Cockerell*

(a) The Lord Chancellor appears to have quoted from a short-hand writer's note. Mr.

*Simons'* Report of the Vice-Chancellor's judgment was not yet published.

*C. Cockerell* and *Mr. Trail*, for any improper investment of the trust fund, which fund, the bill alleges, in 1793, consisted of bonds and certificates of the *East India Company* then deposited with the house afterwards represented by *Palmer & Co.* The decree, therefore, proceeds upon the ground that the liability of *Sir C. Cockerell* and of *Mr. Trail* arises from the decree of 1809, and that the investment in the securities of the *East India Company* was not an improper investment in execution of the trusts of the deeds of 1774 and 1778.

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The original bill, in the suit in which the decree of 1809 was made, was filed by *Mr. and Mrs. Eyles*, she being the widow of *William Barton*, the settlor of the property in 1774, and entitled to a life interest in the fund; and, upon her death pending the suit, the Plaintiff *Eyles's* interest in the subject matter of the suit was reduced to obtaining payment of the interest due up to the time of her death, he having no title whatever to any part of the principal; and, accordingly, the decree of 1809 directs payment to him of the amount of such interest; but it also, though I apprehend irregularly, declares the rights to the principal of the trust monies, that being a question entirely between the co-defendants, and with which the Plaintiff had no concern. It does, however, declare, that one moiety of such principal trust monies was vested in the Defendants *Archibald Paxton* and *Sir W. Paxton*, upon the trusts of the settlement under which the Plaintiff in this cause claims, and directed that the amount thereof should be transferred and paid over to the Defendants *Archibald Paxton* and *Sir William Paxton*, upon the trusts of that settlement. The liability of *Sir C. Cockerell* and *Mr. Trail* is said to arise from their not having acted in obedience to this direction; but there is not only no reason to suppose that they were applied to for that

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purpose, but conclusive evidence that they never were. The Plaintiff, indeed (a), had no interest in that part of the decree; and it does not very well appear how that direction could have been enforced, if there had been any disposition, on the part of the trustees, to resist it. But it is clear that the trustees of the settlement, under which the Plaintiff claims, and those interested in it, might, by new proceedings, have obtained a transfer of the funds, all the trusts of the settlements of 1774 and 1778 having become exhausted by the death of Mrs. *Eyles*; but, until that was actually done, the trustees of those settlements continued trustees of the funds for that which alone remained to be done in the execution of those trusts, namely, transferring one moiety to Mrs. *Le Gros*, one of the children, or those claiming through her, and the other moiety to Mrs. *Silberschildt*, the only other child, and those claiming through her, being the trustees of her settlement, and those who are interested in the trusts of it. Until that was done, the only trusts they had to execute were the trusts of those deeds under which they had undertaken to act. It was not competent for any of the parties interested to impose upon them any new trusts, by any arrangement to which they were not parties. It appears, indeed, that Sir *C. Cockerell* and Mr. *Trail* were named as parties to the settlement of the share of Mrs. *Silberschildt*; but that they did not execute it. They, therefore, were strangers to it. I am not speaking of any fraudulent collusion between different sets of trustees, but of one set of trustees holding trust funds upon an old trust, which are the subject of a new settlement of which others are trustees, who, not calling for a transfer of the funds, permit them to remain in the hands of the old trustees. If the old trustees simply continue to deal with the funds as they were authorized to do by

(a) i. e. The Plaintiff in *Eyles v. Evelyn*.

by the terms of their trust, it is not easy to understand how they can be made responsible for any loss which may arise from the transfer of the funds not having been required by the new trustees. Such loss ought rather to be attributed to the neglect of the new trustees in not calling in the funds; but the effect of this decree is to exonerate the new trustees, and to make the old trustees liable. If, indeed, any such liability attached upon the old trustees, it would so attach when the duty arose of making the transfer, which, in this case, was the death of *Mrs. Eyles* in *February 1805*. The pendency of the suit, in which the Plaintiff could have no claim to any part of the principal of the trust funds, could not prevent this duty from arising at that time. The decree, which merely declared what was not in dispute in that cause, could not add to this obligation.

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It is not, however, necessary to pursue this part of the case further, because, if the effect of the decree of 1809 had been to make it the duty of the old trustees to seek out the means of transferring the funds to *Archibald Paxton* and *Sir W. Paxton*, though not applied to for that purpose, and to impose upon them, 'till that was done, a liability to look to the due execution of the trusts of the *Silberschildt* settlement, it was necessarily competent for those who were interested in that settlement to relieve them from this duty, and to protect them against that liability. No man having a right to require the performance of a duty, who becomes a party to the delay in the performance of it, can complain of any consequences which may arise from such delay. I am not now speaking of a *c'estuique trust* being barred, by acquiescence, from complaining of a breach of trust; but of a case in which there was no breach of trust, but a mere delay in performing an act, with the concurrence of the parties interested.

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The Plaintiff and her sister are admitted to have been born in 1793 and 1795; and both had attained twenty-one before Mrs. *Munch's* marriage in *September 1816*. In 1820, the bill in *Silberschildt v. Paxton* was filed in their names and in the name of their father. It was said, indeed, that their bill was filed without their knowledge. That is not material. They never applied to have their names removed from the record; but in 1828, when they must be taken to have had full knowledge of it and of what was contained in the pleadings, themselves dismissed it with costs, which they must have paid. That bill makes no complaint of the funds not having been transferred to the trustees of the settlement of 1791; but, on the contrary, recognizes the investment in the note for 164,000 sicca rupees, and states that it was held by Sir *C. Cockerell* and Mr. *Trail*, upon the trusts of the indentures of 1774 and 1778, and prays an account of the interest which had arisen from it, but does not pray any thing as to the principal of the trust funds. In 1827, *Jacob Silberschildt*, the father of Mrs. *Munch*, died, whereupon his two daughters became absolutely entitled to the trust fund; and the correspondence shews that, so far from complaining of the trust fund having remained upon the *Indian* security, and not having been transferred to the trustees of the settlement of 1791, they express entire satisfaction at the investment and at the management by Messrs. *Palmer* and Co., and express their intention to continue it upon the same investment and under the same management. I particularly allude to Mr. *Holt's* letter of the 17th of *August 1827*, Mrs. *Munch's* of the 6th of *November 1827*, and the letter of Mrs. *Munch* and Miss *Silberschildt* to Messrs. *Paxton, Cockerell, Trail, and Co.* of the 5th of *February 1828*, saying that they had authorized Messrs. *Reid* and Co. to receive the income, but that it was their wish that the capital should remain  
in

in the same situation and under that management which had for so many years regularly discharged it, and which they hoped and begged Messrs. *Paxton, Cockerell, Trail*, and Co. would continue to do for them as formerly. That this request was not complied with arose from Mr. *Hall's* objecting to his clients, Sir *C. Cockerell* and Mr. *Trail*, continuing responsible for the trust, as appears from Mr. *Holt's* letter to Messrs. *Reid* and Co. of the 20th of *May* 1828. The letters of *Freshfield* and Son of the 16th of *October* 1829, of *Reid* and Co. of the same day, of *Freshfield* and Son of the 19th of *October*, 2d of *November*, and 12th of *November* 1829, and of Mr. *Ryan* of the 27th of *October* 1829, prove, beyond all doubt, the knowledge of Mrs. *Munch*. and her sister of the manner in which the funds had been invested and managed up to that time, and, instead of complaining of their not having been transferred to the trustees of the settlement of 1791, exhibit a decided intention of continuing them in the same investment and under the same management in *India*.

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How is it possible, after this, for those who represent Mrs. *Munch* and her sister to say to Sir *C. Cockerell* and Mr. *Trail* — “You ought, in 1805 or 1809, to have transferred these funds to the trustees of the settlement of 1791; and, because you did not do so, you must make good a loss arising from the failure and misconduct of *Palmer* and Co. in 1830.” It would be strange indeed if, to such a demand, Sir *C. Cockerell* and Mr. *Trail* could not answer, with effect — “We were never requested to make the transfer; and in 1827, at least, you knew that the securities remained in the hands of *Palmer* and Co. and under their control, and requested that they might so continue. Had you then expressed dissatisfaction, or requested a transfer, the fund was safe, and no loss would have been sustained;



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tained; but, with your concurrence and approbation, the fund was left with them, and lost by their misconduct in 1830; and now you ask us to make good a loss which has arisen from our acquiescence in your wishes, and in compliance with your request."

In 1827, upon the death of the father of Mrs. *Munch*, all the trusts of the settlement of 1791 were exhausted; and to have transferred the funds to the trustees of that settlement would have been absurd — they belonged absolutely to Mrs. *Munch* and her sister. At that time no loss had been sustained. They not only did not demand a transfer, but requested that they might remain upon the same investment and under the same management as before; and this under the best advice, both legal and mercantile. If Sir *C. Cockerell* and Mr. *Trail* were bound to execute the directions of the decree of 1809, by transferring the funds to the trustees of 1791, it was competent for them to do so in 1827; and it is equally clear that it was, at that time, competent for Mrs. *Munch* and her sister to dispense with their so doing, and to relieve them from such liability; and that they did so, appears to me to be established, beyond all doubt, by the correspondence and the recitals in the release of the 8th of *January* 1830.

I am, therefore, of opinion that if the decree of 1809 imposed any new duty upon the trustees of 1774 and 1778, and subjected them to any new liability, the conduct of the parties interested relieved them from such duty, and discharged them from such liability.

I must also observe, upon this part of the case, that this supposed effect of the decree of 1809 was not put forward, as a ground of charging the trustees, in the bill, and was not much relied upon at the bar: negligence

gence in leaving the trust funds in the hands of the agent, part not invested and other part in the power of the agent, being the principal ground relied upon for supporting the decree. I proceed, therefore, to examine this part of the case.

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It is, I think, quite clear that no breach of trust is established as to the security upon which the trust property was invested, so far as it was invested in the Government paper of the *East India* Company. The settlements of 1774 and 1778 were *Indian* settlements; the settlor is described as of *Bengal*; the property settled was in that country; the settlement of 1774 directs the trustees to invest the funds in the Company's interest notes, if the same can be procured. The deed of 1778 directs the trustees to lay out the funds on some good and sufficient public or private security or securities, at the best and highest interest that could be had or obtained for the same, and provides for the appointment of new trustees in the place of trustees departing from *India*. The notes upon which the trust fund was from time to time invested answer these descriptions; and no case is made out of there being any other Company's notes or public security in *India* which would so far better answer the description as to shew that such notes were not in the contemplation of the settlement. I am, therefore, of opinion, that the investment upon these notes was not an improper investment.

But the most important question remains—Was there such negligence in the conduct of the trustees, as to the dealing with, and management of, these securities, as to make them liable for the loss that has been sustained? The first subject upon which negligence is, by the bill, imputed to the trustees is, “the not having caused the notes to be indorsed and made payable to *themselves*,  
whereby,

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whereby, according to the course of proceeding observed by the officers of the *East India* Company, the agents, *Palmer* and Co., would have been prevented from selling, pledging, or disposing of the same, or receiving the money thereby secured without the concurrence of the trustees, but would not have been precluded from receiving the interest and dividends from time to time payable thereon, or from receiving from the Government, in lieu of the old bonds or notes when paid off, new bonds or notes made payable to the trustees."

The most plausible argument for charging these trustees with the loss appears to me to be, that it was a breach of trust, from the commencement, to permit the trust money to be invested upon any security not in the names of the trustees : but that argument, I think, fails, if it be proved that no additional security could have been obtained by the note having been taken in the names of the trustees ; for, whether the power over the note, necessarily vested in *Palmer* and Co., arose from the note having been made out to them, or from having been indorsed to them, or from their being authorized to act as the attornies of the trustees, must be immaterial ; — the real question being, not how the power was conferred, but whether it was necessary, or according to the usual course of business by which such transactions are managed, that such power should be vested in agents. If the notes had been made or indorsed payable to the trustees or *their order*, which appears to have been the form of them, Messrs. *Palmer* and Co. would have had no power over the notes except by the indorsement or order of the trustees, or under a power of attorney from them ; but either the order or the power of attorney would have given them the same power as they in fact possessed by the notes having been made out to themselves.

If

If the Plaintiff had proved that the fund, being invested in the notes of the *East India* Company, could have been managed in *India*, according to the usual course of business, without its being within the power of agents, a case either of breach of trust from the manner in which the notes were taken, or of negligence in not taking proper measures to secure the fund, might have been made out; and it occurred to me, at one time, that the Plaintiff might be entitled to an inquiry upon that point: but, upon examining the pleadings and the evidence, I do not think that a case has been made out for such an inquiry, or that there is the least probability of any result from such an inquiry, except additional expense and delay. The deed of 1778 endeavoured to provide for the trustees being always resident in *India*, and, therefore, contained a power, whether effectual or not is immaterial, to substitute new trustees for those who might leave *India*; but that power was to be exercised by *William Barton* only, and he died in 1799. When, therefore, *Sir C. Cockerell* left *India* in 1805, and *Mr. Trail* in 1809, at which periods they respectively ceased to be partners in the house of *Palmer and Co.*, no power existed of appointing new trustees in their place: and the question is, how those trustees, whilst absent from *India*, were to manage these trust funds remaining in *India*, without permitting the agents in *India* to have any power over them. This most important point in the Plaintiff's case, if capable of proof, has not been proved by her; but, on the contrary, it appears to me that the reverse has been proved. These notes are securities liable to be paid off, upon notice, at uncertain periods, or to be exchanged for other notes. It was, therefore, necessary, either that there should be persons in *India* authorized to receive such payment and to deal with the notes, or that, upon every transaction, special authority should be procured from *England*.

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The latter, from the distance, would be attended with necessary inconvenience and probable loss, and is not proved to be, and cannot be supposed to be, the course usually adopted; and, in charging trustees with loss from the misconduct of agents, it is not sufficient to prove that it might have been prevented by extraordinary care and caution. The trustee is not held liable, if, acting strictly within the line of his duty, he exercised reasonable care and diligence.

Another mode, by which the possibility of danger might have been avoided, is stated, in the bill, to have been open to the trustees, namely, to deposit the notes with the Accountant-General of the Court, under a regulation of *December* 1810; but that plan would, according to the regulations printed in the *Government Gazette Extraordinary* of the 31st of *December* 1810, in some of the cases provided for, have equally required, upon each transaction, the authority of the proprietor, or the intervention of an agent acting under a power of attorney in *India*. And there is no proof that such a mode of proceeding was practicable, regard being had to the necessary management of the fund, or so far consistent with the usual course of business under similar circumstances as to make the non-adoption of it a breach of trust. It is also to be observed, from the copies of notes admitted in evidence, that, up to 1822, all the notes were made payable to Messrs. *Palmer* and Co., on account of Mrs. *Eyles* and her children. This was omitted in the note of the 31st of *March* 1822 and those which followed, whether by the direction of *Palmer* and Co., or by the omission of the public officer, does not appear; but there is no evidence to shew that Sir *C. Cockerell* and Mr. *Trail* had any knowledge of the change in the form of the note. It is also to be observed that the release of the 8th of *January* 1830 proves that the Plaintiff

tiff not only knew, and did not disapprove of, the fund being under the management of Messrs. *Palmer* and Co., but that they had the power of varying the securities, which they could not have had without having power over the fund itself.

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It was, however, then said, that, supposing the security was not improper, and that the course of management adopted would not, of itself, subject the trustees to liability, yet, with the knowledge they had of the circumstances of *Palmer* and Co., there was culpable negligence in leaving the security under their control. Several passages were read, from the answers, as to the Defendants' knowledge of the pecuniary situation of *Palmer* and Co., the result of which is, that they had no knowledge of their being insolvent, or likely to fail, until the arrival, in this country, of the news of their having stopped payment; but that, for some months before *January* 1830, they believed them to be under temporary difficulty: that in 1826 or 1827 they began to overdraw their account; but the Defendants, believing their representations that their embarrassments were only temporary, permitted them so to do; they, *Palmer* and Co., promising to reduce the amount by large remittances and consignments; which they failing to do, in *July* 1829, directions were sent to *India* to take measures for recovering the balance, which then amounted to 400,000*l.*, having increased to that sum from 150,000*l.*, the amount in 1827.

At what time the note for 114,800 sicca rupees was applied by *Palmer* and Co. to their own use, does not appear; but, in addition to the oath of the Defendants that they had no suspicion of the insolvency or probability of failure of *Palmer* and Co., there is the fact that, from 1827 to 1829, they were permitting that house

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largely to increase the balance due from them, and were, thereby, in fact, lending them money to the amount of 250,000*l.* What the Plaintiff ought to bring home to the Defendants, upon this part of the case, is, reasonable ground for apprehending, from what they knew of their circumstances, the danger of *Palmer* and Co. appropriating to themselves the note for 114,800 sicca rupees, the property of others. I do not say that no degree of pecuniary distress coming to the knowledge of the trustees would not make it their duty, if possible, to remove from their power the note in question; but I do not think that any such case is made out against Sir C. Cockerell and Mr. Trail. Their conduct, with respect to their own affairs, proves the confidence they placed in *Palmer* and Co.; and I am not now considering whether there was culpable negligence in leaving a sum of money in the hands of persons so circumstanced, but a security, which could not be affected by their pecuniary situation, or endangered by any reason short of a grave offence committed by them.

I am, for these reasons, of opinion that the Plaintiff has failed, as to the note for 114,800 sicca rupees, in making out a case of breach of trust, either from the nature of the original investment, or from culpable negligence in the management of it.

The question as to the money balance appears to me to be subject to a very different consideration. From the account ending on the 30th of *April* 1823, it appears that Messrs. *Palmer* and Co., having received 164,000 sicca rupees in payment of the note they had before held, re-invested only 114,800 sicca rupees, which produced a money balance in their hands of 48,452 sicca rupees. This balance was never afterwards diminished, but amounted, in *January* 1830, the time of the failure, to 50,199 sicca

sicca rupees. Permitting this part of the trust fund to remain in the hands and upon the personal security of Messrs. *Palmer* and Co., was not authorized by the provisions of the deeds of 1774 and 1778, but was a direct breach of trust, made known to Sir *Charles Cockerell* and Mr. *Trail*, by the transmission of the accounts to the house in *London* in which they were partners. This, I think, imposed an original liability upon them, from which they could not be relieved, even if they were able to shew that the loss was a result wholly unexpected, and most unlikely to arise from the course adopted.

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If, indeed, it had appeared that the Plaintiff and her sister, being absolutely entitled to the fund, had had full knowledge of so large a cash balance being left in the hands of Messrs. *Palmer* and Co., and had sanctioned its being left with them, the liability of the trustees would have been discharged; but I not only do not find any evidence to satisfy me that this was the case, but there is, I think, much reason to suppose that they imagined that the whole trust fund in *India* was invested upon the security of the Company's notes. Mr. *Holt*, in his letters of the 17th of *August* 1827, the 20th of *May* 1828, and the 20th of *October* 1828, so considers it; and in the Plaintiff's own letters, expressing a wish that the funds should remain under the same management, the whole is spoken of as invested in the same manner; and no allusion is made to any cash balance. The release of the 8th of *January* 1830 accurately states the position of the funds; but when that was executed, the insolvency had taken place, and the loss was completed.

I, therefore, do not find any such knowledge in the *cestuique trusts* of the position of the fund, and



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such sanction, founded upon such knowledge, as is necessary to exonerate the trustees from that which was clearly a breach of trust. And here the distinction must be marked between the degree of knowledge and sanction necessary for the purpose, and that which is necessary to preclude the *cestuique trust* from complaining of that not being done, the omission to do which, with the concurrence of the *cestuique trust*, never constituted a breach of trust. In the first case, it is used to release a right and discharge an obligation already perfected by the breach of trust; in the latter, only to prevent a right from arising from the non-performance of a duty which it was competent for the *cestuique trust* to dispense with. There is, therefore, no inconsistency in considering the transaction between the parties as sufficient to preclude the Plaintiff from complaining of the decree of 1809 not having been carried into execution, and as wholly insufficient to purge the breach of trust, which had been committed by permitting the large cash balance to remain in the hands of *Palmer and Co.* The release of the 8th of *January* 1830, and its recitals, strongly marks the distinction. It recites the order or decree of 1809, and that the trustees, having been for many years past in this country, the management of the trust funds in *India* had been intrusted to the care of the house of *Palmer and Co.*, who had from time to time varied the securities for the same as occasion required, and received the proceeds thereof, and had annually remitted the same to the house of *Paxton and Co.*, for the benefit of the parties entitled thereto;—and that, without any complaint of the securities having been so left under the management of *Palmer and Co.*,—but that they had, upon the request of the Plaintiff, been directed to be transferred by them to the Plaintiff; and then the Plaintiff releases the trustees generally.

Being

Being of opinion that the Plaintiff has, under the circumstances, no ground of complaint against the trustees, on account of the trust fund, so far as it was invested upon securities, having been left under the management of Messrs. *Palmer* and Co., it is not material to consider how far this instrument could be supported as a release as to that part of the fund: but I am now considering it as evidence of the previous knowledge, approbation, and sanction, on the part of the *cestuique trust*, of that part of the fund which had been so invested, having been left in *India*, and under the management of *Palmer* and Co., and, consequently, of the decree of 1809 not having been acted upon; of which, coupled with the correspondence, it is, I think, conclusive proof. But it furnishes no such proof as to the cash balance; it contains no recognition of the propriety of the position of that part of the trust fund, nor indeed of any knowledge of such position, until the moment at which an order for its transfer to the Plaintiff had been given; for which reason, and because the security of that part of the fund depended entirely upon the solvency, and not upon the honesty and integrity of the agents, as was the case with the security in their hands, I agree with the Vice-Chancellor in thinking, that the release can operate nothing in favour of the trustees. The *cestuique trust*, upon this part of the transaction, was entitled to the most full and correct statement of all the trustees knew of the circumstances of *Palmer* and Co. before they could be barred by a release, the effect of which was to give up a right which already belonged to them, of holding the trustees liable for the breach of trust as to the cash balance.

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In the laborious consideration I have given to this part of the case, I have not found any difficulty as

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to the principle of the Court applicable to the subject. Upon referring to the case of *Clough v. Bond* (a), I have not discovered any reason for doubting the accuracy of the rule which I, in that case, deduced from the previous authorities. The difficulty in this case has been the adaptation of the rule to the very complicated and novel circumstances which the evidence presents.

The result is, that the bill must be dismissed, with costs, as to so much of it as seeks to make Sir C. Cockerell and Mr. Trail liable for the loss sustained by the misapplication, by Messrs. Palmer and Co., of the note for 114,800 sicca rupees, and that there must be a decree, with costs, for the Plaintiff's share of the amount of the cash balance at the time of the failure of that house; and, as the ground of this decree is a breach of trust sanctioned and adopted by the trustees, though originally committed by the act of their agent, I think the Vice-Chancellor's decree right in giving interest upon that sum at 5*l.* per cent. from that time. There are to be no costs of the appeal.

As to the question of the *Paxtons'* costs, I do not think it was necessary for the Plaintiff to proceed against the trustees of the settlement of 1791, or their estates. If they are liable, it must be upon grounds totally different from those upon which the estates of Sir C. Cockerell and Mr. Trail are charged; both may be liable, but the liabilities are different: there is not any which affects both in common.

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(a) 3 *Mylne & Craig*, 490.

As to the costs of Mr. *Le Gros*, and of the representatives of Mr. *Evelyn* and of Mr. *Logan*, the Vice-Chancellor, in 1836, decided that they were all necessary parties to the suit; and from that order there was no appeal. If they had been originally made parties, the Plaintiff must have paid their costs of so much of the bill as I now dismiss; and this, I think, the Plaintiff must now do: and the costs of the Defendants, who have appealed, of this part of the suit, which the Plaintiff will pay, will include the additional costs incurred by those parties not having been originally made Defendants. As to that part of the suit of which I direct the representatives of Sir *C. Cockerell* and Mr. *Trail* to pay the costs, the Vice-Chancellor's order of 1836 decided that the Plaintiff could not prosecute the suit without those parties being before the Court; and as, in the result, no decree is made against them, they must have their costs from the Plaintiff: but if, as the Vice-Chancellor decided, it was necessary to make them parties, in order to prosecute the claim against Sir *C. Cockerell* and Mr. *Trail*, the estates of those parties must repay to the Plaintiff such costs as the Plaintiff is so compelled to pay; but against this there ought, I think, to be set off any additional costs which Sir *C. Cockerell's* and Mr. *Trail's* estates may have to pay, from those parties not having been made original Defendants to the suit. Such additional costs were occasioned by the error of the Plaintiff, and the Defendants ought to be indemnified against such additional costs as it may have occasioned. If required, an account must be taken of the assets of Sir *C. Cockerell* and Mr. *Trail*.

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The Lord Chancellor's order on the appeals was finally drawn up in the following terms:—

“His Lordship doth order that the Decree made in the above causes, dated the 22d day of *December* 1838, be varied and added to, so that, with such variations and additions, the said decree do stand and be as if the same had originally been as follows, that is to say: His Lordship doth order that the bill in which Sir *Charles Rushout Cockerell*, *John Studholme Brownrigg*, and *James Cosmo Melvill* are Plaintiffs be dismissed out of this Court, with costs; and his Lordship doth order that it be referred to Mr. *Wingfield*, the Master to whom these causes are referred, to tax such costs; and his Lordship doth order that such costs, when taxed, be paid by the said last-mentioned Plaintiffs: and, in the other suits, his Lordship doth declare that the late Plaintiff, *Harriet Elizabeth Munch*, was not, in her own right, or as the legal personal representative of *Mary Elizabeth Silberschildt*, deceased, in the pleadings in this cause named, bound by the releases bearing date the 8th day of *January* 1830, in the pleadings of this cause mentioned, or either of them, as to the sum of 25,099 sicca rupees, and 12 annas, hereinafter mentioned; and his Lordship doth order that it be referred to the said Master to inquire and state to the Court what was the value, in *English* money, on the 31st day of *October* 1828, of the sum of 25,099 sicca rupees, and 12 annas, being one moiety of the sum of 50,199 sicca rupees, and 8 annas, the amount of so much of the trust fund in the pleadings mentioned, as on the said 31st day of *October* 1828, was in the hands of Messrs. *Palmer and Company* in the pleadings mentioned, as a cash balance; and it is further ordered, that the said Master do calculate interest, at the rate of 5*l.* per cent. per annum,

annum, upon what he shall so find to be the value of the said sum of 25,099 sicca rupees, and 12 annas, from the said 31st day of *October* 1828; and his Lordship doth declare that the estates of the said Sir *Charles Cockerell* and *Henry Trail* are liable to pay and satisfy to the Plaintiff, *George Reid*, what the Master shall ascertain to have been the value, in *English* money, of the said sum of 25,099 sicca rupees, and 12 annas, on the said 31st day of *October* 1828, and the said interest thereon calculated as aforesaid :

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“ And his Lordship doth order, that the said bill of supplement and revivor, in which *George Reid* is Plaintiff, and *Matthew Denziloe* and *Elizabeth Ann* his wife, and *William Beaufoy Le Gros*, *George William Hawes*, *Ann Evelyn*, and Sir *Charles Rushout Cockerell* are Defendants, be dismissed out of this Court, with costs, against *Matthew Denziloe* and *Elizabeth Ann* his wife, *William Beaufoy Le Gros*, *George William Hawes*, *Ann Evelyn*, and Sir *Charles Rushout Cockerell*, as representative of *William Logan* deceased, but not as against the said Sir *Charles Rushout Cockerell*, as representative of Sir *Charles Cockerell* deceased; and that the said supplemental bill in which the said *George Reid* is Plaintiff, and *Letitia Jane Denziloe* Defendant, be dismissed out of this Court, with costs; and his Lordship doth order, that it be referred to the said Master to tax such costs; and his Lordship doth order that such costs, when taxed, be paid by the said Plaintiff, *George Reid*; and it is ordered, that in taxing such costs, the Master do distinguish such parts of the same costs as were incurred in respect of so much of the said supplemental suits, for the costs of which the estates of the late Defendants, Sir *Charles Cockerell* and *Henry Trail*, are hereinafter declared liable, from such parts of the same costs

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costs as were incurred in respect of so much of the same suits as are hereinafter dismissed against the said late Defendants with costs :

“ And it is ordered, that it be referred to the said Master to tax the said Defendants, *Archibald Frederick Paxton*, *Henry Paxton*, and *William Gill Paxton*, their costs of the said original and revived suits against them ; and his Lordship doth order, that such last-mentioned costs, when taxed, be paid by the said Plaintiff *George Reid* ; and it is ordered that, in taxing such last-mentioned costs, the Master do distinguish such parts of the said last-mentioned costs as were incurred in respect of so much of the said suits, for the costs of which the estates of the said late Defendants, *Sir Charles Cockerell* and *Henry Trail*, are hereinafter declared liable, from such parts of the said costs as were incurred in respect of so much of the same suits as are hereinafter dismissed against the said late Defendants with costs :

“ And his Lordship doth order, that it be referred to the said Master to tax the costs of the late Plaintiff *Harriet Elizabeth Munch*, and of the said Plaintiff *George Reid*, of so much and such parts of the said original, revived, and supplemental suits, in which they are respectively Plaintiffs, as relate to that part of the trust fund in the pleadings mentioned, which appears to have been in the hands of Messrs. *Palmer and Co.*, in the pleadings named as a cash balance :

“ And his Lordship doth order, that, in taxing the costs of all parties of such parts of the said suits for the costs of which the estates of *Sir Charles Cockerell* and *Henry Trail* are hereinafter declared liable, the Master is  
to

to inquire and ascertain what additional costs have been incurred by reason of the said late Plaintiff, *Harriet Elizabeth Munch*, having omitted to make the said Defendants, *Elizabeth Ann Denziloe*, late *Elizabeth Ann Le Gros*, *William Beaufoy Le Gros*, *Ann Evelyn*, and the personal representative of *William Logan* in the pleadings named, parties to the said original bill; and by reason of those several Defendants having been brought before the Court by the said bill of supplement and revivor, filed by the said *George Reid* on the 8th day of *March* 1837, instead of having been made parties to the said original bill, having regard to the facts, that upon the death of the late Defendant *Henry Trail*, who was the surviving acting personal representative of the said *William Logan*, and died in the month of *February* 1835, a supplemental bill would have become necessary, and that upon the marriage of the said *Elizabeth Ann Le Gros* in *October* 1836, another supplemental bill would have become necessary; and the said Master is to ascertain and certify the amount of such additional and extra costs; and his Lordship doth order, that the amount of such additional costs is not to be allowed or included in the amount of costs for which the estates of the said *Sir Charles Cockerell* and *Henry Trail* are declared liable as hereinafter is mentioned, but is to be deducted therefrom:

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“And his Lordship doth declare, that the estates of the said *Sir Charles Cockerell* and *Henry Trail* are liable to pay and satisfy the costs of the late Plaintiff *Harriet Elizabeth Munch*, and of the Plaintiff *George Reid*, of so much and of such parts of the said original, revived, and supplemental suits, as relate to that part of the said trust fund which appears to have been in the hands of the said *Messrs. Palmer and Co.*, as a cash balance, and also the costs which the said *George Reid* shall



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shall pay to the said Defendants, *Archibald Frederick Paxton, Henry Paxton, William Gill Paxton, Matthew Denziloe, and Elizabeth Ann* his wife, *William Beaufoy Le Gros, George William Hawes, Ann Evelyn, and Sir Charles Rushout Cockerell*, as the personal representative of the said *William Logan, and Letitia Jane Denziloe*, of so much and such parts of the said original, revived, and supplemental suits as relates to such last-mentioned part of the said trust fund, after making such deduction as aforesaid :

“And his Lordship doth order, that the said original, revived, and supplemental suits, in which the said *Harriet Elizabeth Munch* and *George Reid* are respectively Plaintiffs, be dismissed, as against the late Defendants *Sir Charles Cockerell* and *Henry Trail*, and the Defendants *Archibald Frederick Paxton, Henry Paxton, William Gill Paxton, John Studholme Brownrigg, James Cosmo Melvill, and Sir Charles Rushout Cockerell*, as the personal representative of the late Defendant *Sir Charles Cockerell*, so far as the said original, revived, and supplemental suits relate to the moiety claimed by the same two Plaintiffs respectively, of the government note for 114,800 sicca rupees in the pleadings mentioned, with costs ; and his Lordship doth order, that it be referred to the said Master to tax the said late Defendants *Sir Charles Cockerell* and *Henry Trail*, and the said Defendants *John Studholme Brownrigg, James Cosmo Melvill, and Sir Charles Rushout Cockerell*, as the personal representative of the late Defendant *Sir Charles Cockerell*, such last-mentioned costs ; and his Lordship doth order that the same, when taxed, be paid by the said Plaintiff *George Reid* :

“And it is ordered, that the said Master be at liberty, in certifying what is to be paid in respect of  
 costs

costs to either party, to deduct therefrom what he shall certify to be due from such party in respect of costs, to be paid by such party to the other :

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“ And his Lordship doth order, that if the said Defendant *Sir Charles Rushout Cockerell*, the executor of the said *Sir Charles Cockerell*, shall not admit assets of the said *Sir Charles Cockerell* sufficient for the purposes aforesaid, then the said Defendant *Sir Charles Rushout Cockerell* is to come to an account before the said Master, for the personal estate and effects of the said *Sir Charles Cockerell* come to his hands or to the hands of any other person or persons by his order, or for his use ; and if the said Defendants, *John Studholme Brownrigg* and *James Cosmo Melvill*, the acting executors of the said *Henry Trail*, do not admit assets of the said *Henry Trail* sufficient for the purposes aforesaid, then they are to come to an account before the said Master, for the personal estate and effects of the said *Henry Trail* come to their hands, or to the hands of any other person or persons by their or either of their order, or for their or either of their use :

“ And for the better taking the said accounts and discovery of the matters aforesaid, the parties are to produce before the said Master, upon oath, all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined upon interrogatories as the said Master shall direct, who, in taking the said accounts, is to make unto the parties all just allowances :

“ And his Lordship doth reserve the consideration of all further directions, and of the subsequent costs of these suits, until after the said Master shall have made his report :

“ And

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“And it is ordered, that the said Sir Charles Rushout Cockerell, and the Defendants John Studholme Brownrigg and James Cosmo Melvill respectively, do pay unto the Defendants Ann Evelyn, Matthew Denziloe, and Elizabeth Ann his wife, George William Hawes and Letitia Jane Denziloe, and William Beaufoy Le Gros, their respective costs of the said petition of appeal, to be taxed by the said Master; and it is ordered, that the sums of 20*l.* and 20*l.* deposited by the said Sir Charles Rushout Cockerell and by the said Defendants, John Studholme Brownrigg and James Cosmo Melvill, with the Registrar, on setting down the said petitions of appeal to be heard before his Lordship, be returned to the said Defendants respectively; and his Lordship doth not think fit to make any order with respect to the costs of the said other parties of the said petitions of appeal :

“And any of the parties are to be at liberty to apply to this Court as they may be advised.”

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BETWEEN

CHARLES VANDERGUCHT - - Plaintiff;

AND

The Honourable WILLIAM DE BLAQUIERE  
and Lady HARRIET his Wife, ROBERT MONT-  
GOMERIE, and the Honourable PETER BOYLE  
DE BLAQUIERE - - Defendants.

Aug. 7, 8.  
Nov. 16.

**T**HE bill in this cause, as amended, sought to enforce payment, out of a sum of 380*l.* per annum, payable by the Defendant, General the Honourable *William De Blaquiere*, to Lady *Harriet* his wife, of two debts, of 225*l.* and 13*l.* 8*s.*, due from her to the Plaintiff, and for one of which, viz. 225*l.*, she had accepted a bill of exchange in the Plaintiff's favour.

Husband and wife, who were separated, entered into an agreement in writing, providing for their living together again, and stipulating that, in the event of a future separation for a particular cause, the wife should receive the income of her own fortune, which her husband was entitled to receive, and that her mother should indemnify him against her debts.

The original bill was filed on the 15th of *December*, 1837, against the husband and wife only, praying, amongst other things, an injunction to restrain the husband from paying the 380*l.* per annum, therein described as two yearly sums of 300*l.* and 80*l.*, to the wife; and on the 12th of *February*, 1838, before her answer came in, an injunction, as prayed, was granted by the Vice-Chancellor,

They afterwards separated, for the cause referred to by the agreement, and the wife obtained a divorce in the Ecclesiastical Court, and a sentence for permanent alimony to an amount exceeding the income of her fortune. That alimony was regularly paid by the husband, and he received the income of her fortune.

The wife accepted a bill of exchange in favour of a creditor of her own.

In a suit by that creditor, an injunction was granted to restrain the husband from paying to the wife the annual amount of the income of her fortune, as the validity of the agreement for future separation, under which she was entitled to such income, was not in dispute between the husband and wife.

Whether such an agreement would be held valid, if disputed, *quære*.

*Semble*, the Court will not interfere, either to compel or to restrain the payment of alimony, as such, except so far as to grant a writ of *ne exeat* against the husband.

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Chancellor, upon affidavit of service of notice of motion, and upon affidavit of merits.

Lady *Harriet* afterwards put in her answer, and moved, before the Vice-Chancellor, that the injunction might be dissolved; and, upon this motion, His Honor made an order, on the 11th of *July*, 1838, dissolving the injunction, with costs.

A report of His Honor's decision will be found in the 8th volume of Mr. *Simons's Reports*, p. 315.

The bill was subsequently amended, in the month of *January* 1839, and, as amended, its material statements were, in substance, as follows:

That previously to the marriage of the Defendants *William De Blaquiere* and Lady *Harriet* his wife, then Lady *Harriet Townshend*, the sum of 6000*l.*, being Lady *Harriet's* fortune, was assigned to Lord *Bayning*, since deceased, and the Defendants *Robert Montgomerie* and *P. B. De Blaquiere*, upon trust to pay the income of it to the Defendant *William De Blaquiere* for his life:

That, before the month of *November* 1812, *William De Blaquiere* and Lady *Harriet* differed, and separated from each other; but that on the 7th of *November* 1812, on the occasion of their again beginning to live together, an agreement was signed by *William De Blaquiere* and Lady *Harriet*, and by the Marchioness *Townshend* her mother, and Mr. *Harrington Hudson*, who had married her (Lady *Harriet's*) sister, by which it was provided, that if Lady *Harriet* should repeat accusations against her husband with respect to conjugal infidelity, he should be at liberty to carry her to Mr. *Hudson's*, who would receive her, and that upon such a removal, she should become entitled to the whole income of her own fortune,

fortune, for her separate maintenance, and likewise to receive from her husband the further sum of 100*l.* per annum for the maintenance and bringing up of her child, with particular provisions as to the length of time during which the child should remain with her; and that, with the income of her own fortune and the allowance for the child so long as the same should be continued to her, she should maintain herself and her child, and not incur any debts for which her husband might become liable; and that her mother, the Marchioness *Townshend*, should indemnify her husband against the payment of any debts which she (*Lady Harriet*) might contract, beyond the before mentioned allowance, provided she was permitted to receive the income of her own fortune regularly, and the allowance for the child as long as he continued under her care :

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That the husband and wife continued to live together until the month of *June* 1814, when she made accusations against him with respect to conjugal infidelity; and that, in that month, they again separated; and that she then, or shortly afterwards, went to reside with Mr. *Hudson*; and that they had ever since lived separate from each other :

That, upon the last mentioned separation, *Lady Harriet* became entitled to receive, for her separate maintenance, the income of her fortune; and that the husband continued to receive it from the trustees, and to pay it to *Lady Harriet*, or her mother, for her use, until her separate maintenance was increased by the sentence for alimony afterwards mentioned; and that, in particular, he made such payments in the year 1819 and up to *May* 1820 :

That, in *February* 1819, *Lady Harriet* instituted a suit in the Consistory Court of *London*, against her  
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husband, for a divorce by reason of adultery ; and that, in the progress of such suit, she applied to the Court for permanent alimony ; and that, by her allegation of faculties, she stated that her husband was entitled, for his life, under the marriage settlement, to an income of 300*l.* being the interest of the before mentioned 6000*l.* which was then laid out on mortgage ; and that, by his answer to that allegation, he admitted that such was the case ; but stated that, under an agreement made with his wife and her mother, he had for several years regularly paid, and then continued regularly to pay, to Lady *Harriet*, for her separate use, the whole of the before mentioned income of 300*l.* :

That the Judge of the Consistory Court, by his decree or sentence, dated the 16th of *May* 1820, pronounced for the divorce, and allotted to Lady *Harriet* 380*l.* per annum, as permanent alimony, to be paid quarterly from the date of the sentence :

That the 380*l.* per annum was allotted for alimony, on the principle of giving to Lady *Harriet* the yearly sum of 80*l.*, in addition to the yearly sum of 300*l.* then paid to her as before mentioned ; and that the before mentioned agreement was not put an end to by the sentence, but that Lady *Harriet* was entitled, in case of need, to obtain or compel payment, by means of the agreement, of the income of her own fortune, in part satisfaction of the alimony :

That for many years past the alimony had been paid quarterly by payments due on the 16th of *February*, the 16th of *May*, the 16th of *August*, and the 16th of *November*, by *William de Blaquiere*, to Lady *Harriet*, at Messrs. *Herries, Farquhar, & Co.*'s, who were her bankers, for her account ; and that she had received the same, and was then in the receipt thereof, for her sole and  
 separate

separate use, maintenance, and benefit; and that *William De Blaquiere* had been permitted to receive the income of the 6000*l.*, or the securities on which it had been invested, and that he was then in the receipt thereof by the authority of the trustees:

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That, on the 8th of *June* 1835, Lady *Harriet* was justly indebted to the Plaintiff for goods, money, and other valuable considerations in the sum of 225*l.*, which she promised to pay out of the before mentioned separate income and maintenance, and to charge the same therewith; and that, for that purpose, she agreed to accept the following bill of exchange drawn by the Plaintiff, viz., — “*London, June 8th, 1835, 225l. One month after date, pay to my order the sum of 225l. for value received. To the Right Honourable Lady Harriet de Blaquiere, Palace, Hampton Court, C. Vandergucht;*” and that she accepted the bill by writing thereon the words following, — “*Harriet de Blaquiere, payable at Messrs. Herries, Farquhar, & Co.:*”

That the bill was presented at Messrs. *Herries, Farquhar, & Co.*’s, when due, and was dishonoured; and that the 225*l.* with interest thereon, from the 8th of *July* 1835, remained due to the Plaintiff:

That, besides the 225*l.* and interest, Lady *Harriet* was indebted to the Plaintiff in sums amounting to 13*l.* 8*s.* for goods sold and delivered to her at various times, which sums, at the time of the sale and delivery of such goods, she promised and undertook to pay to the Plaintiff, out of the before-mentioned income and maintenance, and to charge the same therewith.

The bill charged, that, as *William de Blaquiere* was living separate from his wife, and allowed and paid her the before mentioned yearly sum for her separate main-



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tenance (which was a suitable maintenance for her), he was not liable to pay her debts, and that the Plaintiff was without remedy against him.

The bill prayed an account of what was due to the Plaintiff in respect of the 225*l.* and the interest of it, and the other sums due to him from *Lady Harriet*; and a declaration that the amount due to him was a charge on the 380*l.* per annum payable as alimony as aforesaid, and the arrears thereof; or otherwise that it might be declared that, by virtue of the agreement of the 7th of *November* 1812, *Lady Harriet* was entitled to receive the income of the 6000*l.* specifically, in part payment of the 380*l.* per annum; and that the amount so due to the Plaintiff was a charge on such income, and the arrears thereof; and that an account might be taken of the arrears of the 380*l.* per annum, or of the income of the 6000*l.*, as the case might require; and that the amount so due to the Plaintiff, together with his costs of the suit, might be paid to him out of such arrears and the growing and future payments of the 380*l.*, or of the income of the 6000*l.*, as the case might require; and that, in the mean time, the same might be paid into Court; and that *William de Blaquiere*, *Robert Montgomerie*, and *P. B. de Blaquiere* might be restrained, by injunction, from paying any sum or sums on account of the before mentioned yearly sums, or either of them, or the arrears thereof, or any part thereof, to *Lady Harriet*, or for her use, or on her account, and that she might be restrained from receiving payment thereof, or of any part thereof, by herself, or any person or persons, for her use or on her account.

The original bill and the affidavit of merits in support of it did not state the agreement of the 7th of *November* 1812 as such, but stated that 300*l.* per annum was payable to *Lady Harriet* by the General, under an agreement made on their separation in 1814, and that  
 80*l.*

80*l.* per annum additional was payable to her by him under the sentence of the Ecclesiastical Court. Lady *Harriet*, by her answer to the original bill, denied that it was ever agreed between her and the General that he should pay to her 300*l.* per annum, or any other sum. That denial, however, was qualified by her answer to the amended bill, as will be presently seen. By her answer to the original bill she admitted the acceptance and dishonour of the bill of exchange.

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After her answer to the original bill was put in, but before the motion to dissolve the injunction was heard, an affidavit was made, verifying the agreement of the 7th of *November* 1812; but the reporters are informed that the Vice-Chancellor considered that it was in opposition to the answer, and that, therefore, it was not read before his Honor.

Lady *Harriet de Blaquiere*, by her answer to the amended bill, put in on the 24th of *May* 1839, admitted the marriage settlement, and that, by it, the 6000*l.*, being her fortune, was assigned to the three trustees before mentioned, upon trust to pay the interest to *William de Blaquiere* during his life; and stated that, in the month of *May* 1812, *William de Blaquiere* took her to the house of Mr. *Harrington Hudson*, her sister's husband, and there left her, and forbade her to return to his house, and that she continued at Mr. *Hudson's* until sometime in the month of *November* 1812, living separate and apart from her husband; and that, according to her belief, in or about the month of *October* or *November* 1812, *William de Blaquiere* consented to put an end to the state of separation, on the terms of Lady *Harriet's* undertaking not again to accuse him of conjugal infidelity, which she accordingly undertook to abstain from doing, submitting, in that respect, to the terms imposed by *William de Blaquiere*; and that she believed it was also understood or arranged

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that Mr. *Hudson* would again receive her, if another separation should take place, or to some such effect; and she thought it not improbable, and was disposed to believe, although she had no recollection thereof, that *William De Blaquiere* and herself respectively, on the last mentioned occasion, signed some writing, agreeing to live together, and expressing, on her part, an agreement or undertaking to the effect before mentioned; and she believed that, in or about the month of *November* 1812, a reconciliation took place, and was agreed upon in manner and upon the terms before mentioned; and she said that she did not recollect signing the agreement of the 7th of *November* 1812 stated in the bill; and that if it should appear that she, in fact, signed the agreement in the bill stated, or any such agreement, she believed she signed it under the impression that the same was only an agreement for a reconciliation, and for the observance of certain terms and conditions on her part in regard to her conduct towards *William De Blaquiere*, in certain respects, as the price of such reconciliation; and that she was not aware that any paper signed by her contained any stipulations in regard to separate maintenance; and that she certainly, according to her recollection and belief, never concerned herself with any matter relative to separate maintenance, her anxious attention being then, as she verily believed, confined to her reunion with her husband; and that, under the circumstances, impressions, and belief before mentioned, she, in her answer to the original bill, denied, in manner therein stated, the existence of any agreement for a separation between herself and *William de Blaquiere*, or for a separate maintenance; and that she was the rather induced to make such denial, because no such agreement was made at the time when the subsequent and final separation in *June* 1814 took place between her and her husband, or afterwards, and because no such agreement or any agreement was made on the occasion

occasion of the former separation in *May* 1812. She admitted, that, in or about *June* 1814, she made accusations against her husband with respect to conjugal infidelity, and that they then again separated; but that her husband, upon that occasion, took her to her mother's, and there left her, and that she did not then or afterwards go to reside with Mr. *Hudson*, either in pursuance of the agreement or otherwise. She said that, to the best of her recollection and belief, during the period in the amended bill mentioned, *William de Blaquiere* never made any payments or payment direct to her, but made such payments as he did make to her mother, during her life; and that after her mother's death, which was in the month of *March* 1819, she believed she received, from several persons whom she mentioned, up to the month of *May* 1820, several sums which she mentioned, amounting to 375*l.*, which, she believed, were sums paid to those persons by *William De Blaquiere* for her use.

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She admitted that her allegation of faculties in the Consistory Court and her husband's answer to it, and the judge's sentence, were to the purport stated in the amended bill. She said that the whole 380*l.* was given as and for alimony; and she believed that the amount thereof was fixed by reference to the amount of the income derived by *William de Blaquiere* from her fortune and to his other means; and that she was advised that the agreement mentioned in the bill, if any such there were, was put an end to by the sentence; and that she was not entitled, in case of need, to obtain or compel payment by means of such, if any, agreement, of the income of her own fortune, in part satisfaction of her alimony. She believed that her husband had received, and was then in the receipt of, the income of the 6000*l.*, and that that sum was then invested in 3 per cent. consols, in the names of the surviving trustees of the marriage settlement.

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The answer of the Defendant *William de Blaquiere* to the amended bill, put in on the 30th of *July* 1839, admitted the agreement of the 7th of *November* 1812, and that from the time of the separation of 1814, to the sentence of alimony, he received the income of the 6000*l.*, and paid it to, or for the use of, Lady *Harriet*; and that, since that sentence, he had received the income of the 6000*l.*, or of the securities upon which it had been invested, and that he was still in such receipt; and that the 380*l.* per annum, allotted for alimony by the sentence, had been paid by him to Lady *Harriet*, through Messrs. *Herries, Farquhar, & Co.*, his bankers, by quarterly payments, which became due at the times mentioned in the bill; and that the last of such payments was made in the month of *May* then last; and that the 380*l.* per annum did constitute a suitable maintenance for Lady *Harriet*; and that he was advised that he was not liable at law to pay her debts; and that he intended to continue to pay the 380*l.* per annum, quarterly, to Lady *Harriet*, or to *Herries, Farquhar, & Co.*, unless restrained by the Court from so doing.

The Plaintiff now moved, upon these answers, and upon the affidavit verifying the agreement of the 7th of *November* 1812, that the Vice-Chancellor's order of the 11th of *July* 1838 might be discharged or varied; and that the costs paid by the Plaintiff, in pursuance of it, might be repaid to him; and that the Defendant *William de Blaquiere* might be restrained from paying the income of the 6000*l.*, or the 380*l.* per annum, to Lady *Harriet*; and that she and her agents might be restrained from receiving the income of the 6000*l.*, or the 380*l.* per annum; and that the Defendant *William de Blaquiere* might be ordered to pay into Court the income of the 6000*l.*, or the 380*l.* per annum.

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Mr. *Stuart* and Mr. *James Parker*, in support of the motion.

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Mr. *Jacob*, Mr. *Wigram*, and Mr. *Lloyd*, for Lady *Harriet de Blaquiere*, in opposition to the motion, contended that the agreement of 1812 was illegal and void, as being made with a view to a future separation, and that it, in effect, gave General *De Blaquiere* the power of divorcing his wife when he pleased, and that neither that agreement itself, nor any income supposed to be derived under it, could be recognized by the Court; that the agreement must be considered to have been repudiated by the Ecclesiastical Court, and, if ever binding, to have been superseded by the separation which had taken place under the sentence of that Court; and that the whole 380*l.* per annum must be considered to have been paid as alimony; that, as alimony, which was the creature of the Ecclesiastical Court, it could not be anticipated or charged; and that, even if any part of it could be considered as an allowance for separate maintenance, as distinguished from alimony, it would not be susceptible of being charged or anticipated, any more than a payment of a sum of money for housekeeping expenses; and that an allowance for separate maintenance was, in this respect, different from separate property, which was the creature of Equity, and was dealt with in Equity as property. They further contended, that, even if the 380*l.*, or any part of it, were chargeable, either as alimony, or as separate maintenance, or as separate property, there had not been, in the present case, any charge of it, or any attempt to charge it, and that the mere acceptance of the bill of exchange, which did not allude to it, could not operate as a charge upon it, or as an agreement to charge it. They stated that the present annual income of the 6000*l.* was only 220*l.*, arising from an investment in 3 per cent. consols.

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Mr. *Wilbraham*, for General *de Blaquiere*.

Mr. *Stuart*, in reply.

The following cases were referred to : —

The reports of the present case, in the Ecclesiastical Court, in 3 *Phillim.* 258., and 3 *Haggard's Ecclesiastical Reports*, 322., *Wilson v. Wilson* (a), *Davis v. Davis* (b), *Mytton v. Mytton* (c), *Ashton v. Ashton* (d), *Harvey v. Harvey* (e), *Colmer v. Colmer* (g), *Oxenden v. Oxenden* (h), *Rodney v. Chambers* (i), *Durant v. Titley* (k), *Jee v. Thurlow* (l), *Westmeath v. Salisbury* (m), *Stuart v. Kirkwall* (n), *Stones v. Cooke*. (o)

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*The* LORD CHANCELLOR.

The bill prays, in the alternative, either for payment out of the 380*l.*, payable by General *de Blaquiere* to Lady *Harriet*, his wife, under a decree for alimony by the Ecclesiastical Court, or out of the income arising from 6000*l.*, her fortune, which was settled upon their marriage, and for an injunction to prevent Lady *Harriet* from receiving any part of such income until payment of the Plaintiff's demand. In *February* 1838, the Vice-Chancellor granted an injunction, on affidavit of notice, the Defendant Lady *Harriet de Blaquiere* not appearing. She afterwards put in her answer, professing ignorance of the agreement by which 300*l.* was secured to her, and representing the whole 380*l.* to be alimony; and, in *July* 1838, moved to dissolve the injunction.

(a) 2 *Hagg. Consist. Rep.* 205.

(b) *Ib.* 204 n.

(c) 3 *Hagg. Consist.* 657.

(d) 1 *Rep. Cha.* 87.

(e) 2 *Cha. Ca.* 180.

(g) *Moseley*, 118.

(h) *Gillb. Rep.* 1, & 2 *Vern.* 493.

(i) 2 *East*, 283.

(k) 7 *Price*, 577.

(l) 2 *B. & C.* 547.

(m) 5 *Bligh*, 339. see 366.

(n) 3 *Mad.* 387.

(o) 8 *Sim.* 321 n.

junction. On the part of the Plaintiff, the agreement of the 7th of *November* 1812, under which she was entitled to receive the income arising from the 6000*l.*, was verified (*a*); but, according to the report of the case in 8 *Sim.* 315., the judgment proceeded entirely upon the assumption that the 380*l.* was to be considered as alimony; and the Vice-Chancellor dissolved the injunction, with costs, upon the ground that the Plaintiff had mis-stated his case, by representing that the 300*l.* a year was separate property of the wife.

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If the whole 380*l.* were to be considered as alimony, and if there were nothing else in the case, I should agree with this judgment, because no case having been referred to in which this Court has exercised its jurisdiction over alimony, except (*a*) in granting writs of *ne exeat*, and the decision in *Stones v. Cooke*, by Lord *Lyndhurst*, as reported 8 *Sim.* 321., not being against it; I should hesitate to assume such jurisdiction; and, if the Court is not to exercise it for the purpose of compelling payment of alimony, it follows that it would not interfere, by injunction, to prevent the wife from receiving what it had no jurisdiction to award to another claiming through her. But it has not been explained to me why the Plaintiff's case, as stated in his bill, and resting upon the agreement of the 7th of *November* 1812, was disregarded in the Vice-Chancellor's Court (*b*). From that agreement, as verified, it appears that the husband and wife had before separated; and, having agreed to live together again upon certain conditions, it was agreed, through the intervention of the wife's relatives, that they should

(*a*) *Turn. & Russ.* 322.; *Oldham v. Oldham*, 7 *Ves.* 410.

(*b*) The reporters believe that his Lordship was not aware that

the affidavit, verifying this agreement, was not read in the Court below.



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should live together; but that if the wife should again accuse the husband of infidelity, that they should again separate; and that, in that case, the wife should receive the whole income of her fortune, that is, of the 6000*l.* to which, by the marriage settlement, the husband was entitled for life, for her separate maintenance; that, with that income, she was to maintain herself, and not to incur any debt for which the husband might become answerable; and the wife's mother, who was a party to the agreement, agreed to become surety for the wife, and to indemnify the husband against the payment of any debt which the wife might contract beyond the above allowance, provided she was allowed to receive the income of her fortune.

The anticipated separation took place in 1814; and in 1819 the wife instituted a suit in the Ecclesiastical Court for a divorce, upon the ground of adultery by the husband, and obtained a sentence for that purpose, and the Court allotted to her 380*l.* per annum for alimony.

The Plaintiff's demand is for articles furnished to the wife, in respect of which she accepted a bill, dated the 8th of *June* 1835, drawn by the Plaintiff, for 225*l.*, upon her, and made payable at Messrs. *Herries & Co.* It was contended, and there seems to be reason to suppose, that the 380*l.* was fixed by adding the 80*l.* to the 300*l.* she was entitled to receive as interest of the 6000*l.*; but the sentence giving alimony takes no notice of her title to the 300*l.*, but directs payment of the whole 380*l.* as alimony. (*a*)

Assuming that the 380*l.* was to include the interest of the 6000*l.*, it is clear that the wife cannot be entitled

(*a*) 3 *Hagg.* 322—329. 3 *Phillim.* 258.

entitled to receive both; but if she was entitled to receive the interest of the 6000*l.* under the agreement, I do not find any thing in the case to deprive her of that right. Her title to whatever might be the amount of such interest would be better under the agreement than under the decree for alimony, as not being subject to the discretion of the Ecclesiastical Court, and as having the trust fund itself as her security, instead of the personal liability of the husband. If, then, her title, under the agreement, to the income of the 6000*l.* be good, and has not ceased to exist, this case does not differ from the many others which have occurred, in which this Court has given to a creditor of a married woman, to whom she has given a bill for the debt (*a*), a remedy against her income settled to her separate use; and, if so, this Court would not hesitate to give effect to such a right in the creditor, by preventing the married woman from receiving her separate income whilst the creditor remained unsatisfied.

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But it was argued that the agreement was illegal, as providing for a future separation. (*b*) If it were necessary to decide that point, the difficulty of endeavouring to reconcile the different authorities upon that subject, and to extract a sound rule from them all, would be to be encountered. In *Rodney v. Chambers* (*c*), a covenant providing a separate maintenance for the wife, in the event of a future separation, was held good. In *Durant v. Titley* (*d*) it was held good in the Court of Exchequer, and bad in the Exchequer Chamber by Lord Tenterden and Lord C. J. Dallas; but in *Jee v. Thurlow* (*e*), Lord Tenterden says, that the Judges who decided *Durant v. Titley* did not intend to shake any former

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| ( <i>a</i> ) 3 <i>Madd.</i> 387.  | 4 <i>Sim.</i> 82.    | ( <i>c</i> ) 2 <i>East</i> , 283.                       |
| 5 <i>M. &amp; K.</i> 209.         |                      | ( <i>d</i> ) 7 <i>Price</i> , 577.                      |
| ( <i>b</i> ) 2 <i>East</i> , 285. | 2 <i>B. &amp; C.</i> | ( <i>e</i> ) 2 <i>Barn. &amp; Cress.</i> 547., see 551. |
| 547. <i>Jacob</i> , 126. 140.     |                      |   |

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former decision; and in *Westmeath v. Salisbury* (a) the Court of Chancery in *Ireland* having held such a provision illegal, and an appeal having been brought before the House of Lords upon other grounds, so that this question was not before the House for decision, Lords *Eldon* and *Lyndhurst* expressed very decided opinions against the legality of such provisions for future separation. There are, no doubt, shades of distinction between the circumstances of those cases, and some facts in this case, which differ from them all, and particularly in this, —that the agreement, providing for the event of a future separation, was not entered into when the parties were living together, but was the price and condition of terminating a state of separation. There are many other cases applicable to this subject; but those I have referred to are sufficient to shew, if the question of the legality of the agreement were to be decided between these parties, that the question is of too much importance to be disposed of upon an interlocutory application. It could only be properly decided at the hearing; and an injunction in the meantime would be much of course. But it will be to be considered how far, between these parties, such a question can arise. The Plaintiff does not seek to enforce the contract, but only to establish a title to the fruits of it when carried into effect, and to receive payment, from the wife; or those about to pay it to her, out of such fruits, sufficient to discharge his demand. I think, therefore, that, so far as relates to the 300*l.* per annum under the agreement, there must be an injunction as prayed, which leaves untouched the title to the alimony.

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The minutes of this order, as drawn up, discharged so much of the Vice-Chancellor's order as directed the  
 Plaintiff

(a) 5 *Bligh*, N. S. 339., see 366.

Plaintiff to pay costs to Lady *Harriet*; and it ordered that the costs paid under that order should be repaid, and that an injunction should be awarded to restrain General *de Blaquiere* from paying the income of the 6000*l.* to Lady *Harriet*, until further order.

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Mr. *Stuart* and Mr. *James Parker*, on behalf of the Plaintiff, afterwards applied to the Lord Chancellor to extend these minutes, so as to direct that the income of the 6000*l.* should be paid into Court.

Nov. 30.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Lloyd*, for Lady *Harriet de Blaquiere*, opposed the application.

Mr. *Wilbraham*, for General *de Blaquiere*, did not object.

The LORD CHANCELLOR refused the application, with costs.

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On a subsequent day, however, upon the application of Lady *Harriet de Blaquiere* herself, and with the concurrence of the Plaintiff and General *de Blaquiere*, an order was made for payment into Court of the arrears then due of the 380*l.* per annum, and of a part of the next accruing payment of that sum.

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July 4.

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The reporters are informed that the suit was afterwards compromised.

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May 31.  
June 1.  
Dec. 17.

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Testator devised two estates to trustees for 500 years, and, subject thereto, devised one estate to his grandson *A.* for life, with remainder to *A.*'s sons in tail male, with remainder to *A.*'s daughters in tail general, with remainder to testator's grandson *B.* for life, with similar remainders to *B.*'s issue, and devised the other estate to *B.* for life, with remainder to *B.*'s sons in tail male, with remainder to his daughters in tail general, with remainder to *A.* for life, with similar remainders to

his issue; and he declared the trusts of the 500 years' term to be that, in case either *A.* or *B.* should die without issue, whereby the survivor of them would become entitled to both estates, 2000*l.* should be raised for each of the testator's two granddaughters.

*A.* died, leaving a daughter, and then *B.* died without issue, whereupon the two estates became united in *A.*'s daughter; but, as both *A.* and *B.* were dead, the event of the survivor of them becoming entitled to both estates did not happen.

Held, that if it was intended that the 2000*l.* should be payable in case of an union of both estates happening otherwise than in the lifetime of one of the two grandsons (*A.* and *B.*), such intention was too remote.

**T**HIS was an appeal from an order of the Master of the Rolls, allowing a general demurrer to the bill.

The question turned upon the construction of a will stated in the bill.

A full report of the case below will be found in the second volume of Mr. *Keen's Reports.* (*a*) :

Mr. *Wigram*, Mr. *Girdlestone*, and Mr. *Gardner* stated the argument in support of the demurrer. (*b*)

Mr. *Richards* and Mr. *Heath* were heard in support of the bill.

The authorities referred to in argument were: *Morse v. Lord Ormonde* (*c*), *Tollett v. Tollett* (*d*), *Ellicombe v. Gompertz* (*e*), *Wilmot v. Wilmot* (*g*), *Ranelagh v. Ranelagh* (*h*), *Goodwin v. Clark* (*i*), *Fearne's Contingent Remainders*

(*a*) 2 *Keen*, 764.

(*b*) It seems to have escaped observation that the Appellant's counsel ought to have begun. See *Attorney-General v. Aspinall*, 2 *Mylne & Craig*, 615.

(*c*) 5 *Madd.* 99. 1 *Russ.* 382.

(*d*) *Amb.* 177. 194.

(*e*) 5 *Mylne & Craig*, 127.

(*g*) 8 *Ves.* 10.

(*h*) 2 *Mylne & Keen*, 441.

(*i*) 1 *Lev.* 35., and 1 *Sid.* 102.

*mainders (a), Bristow v. Boothby (b), Egerton v. Jones (c), Eales v. Conn (d), Aiton v. Brooks (e), Barlow v. Salter (g), Crowder v. Stone (h), Doe v. Wainewright (i), Brownsword v. Edwards (k), Roper v. Hallifax (l), Doe dem. Lumley v. Scarborough. (m)*

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At the conclusion of the argument in support of the bill,

*The LORD CHANCELLOR* said he would hear the reply of the counsel who supported the demurrer, if, upon consideration, he should think it necessary.

*The LORD CHANCELLOR.*

Dec. 17.

After the Appellant had concluded his case at the hearing of this appeal, I was so impressed with the impossibility of its being maintained, that I declined hearing the Respondent, for the purpose of my considering the case in private. The result of that consideration has been to confirm the opinion I had so formed. The testator first created a term of 500 years, and, subject to that term, devised one estate to his grandson *Thomas*, for life, remainder to his sons in tail, with remainder to his daughters in tail general, remainder to his grandson *Philip*, with similar limitations; and he devised another estate in the same manner, only putting *Philip* before *Thomas*. And he declared the trusts of the 500 years' term to be that, in case either *Thomas* or *Philip* should depart

(a) Pp. 476. 614.

(b) 2 *Sim. & Stu* 465.

(c) 5 *Sim.* 409.

(d) 4 *Sim.* 65.

(e) 7 *Sim.* 204.

(g) 17 *Ves.* 479.


(h) 5 *Russ.* 217.

(i) 5 *T. R.* 427.

(k) 2 *Ves. Sen.* 243. see 248.

(l) 8 *Taunt.* 845.

(m) 5 *A. & H.* 2. 897.

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depart this life without issue, whereby the survivor of them would become entitled to all his estates comprised in the said term, that his trustees should raise 2000*l.* for each of his grand-daughters, through whom the Plaintiff claims. *Thomas* died, leaving a daughter and *Philip* surviving, and afterwards *Philip* died without issue, whereby both estates became united in *Thomas's* daughter; and the Plaintiff's case is that, therefore, the 2000*l.* became payable. It is clear that the event upon which that sum was made payable has not happened; for, although *Philip* has died without issue, there was no survivor of *Thomas* and *Philip* to take both estates. To read the word "survivor" as "other" will not alter the case, both the grandsons having only life estates; but the Appellant contends that the intention being to make the 2000*l.* payable upon the union of the two estates, the provision must be considered as applicable to that event, though happening after the death of the grandsons and during the possession of their issue. If so, it must be applicable to the union of the two estates during the possession of remote as well as of immediate issue. Indeed, the dying without issue would mean an indefinite failure of issue, unless confined by the provision that it must happen during the life of the survivor, which restriction this argument excludes; so that the 2000*l.* would, upon that construction, be payable either upon an indefinite failure of issue generally, or, at least, of the issue male, or issue of daughters who were entitled to take the estates (and I will assume that the latter is the true construction), and the Appellant thereupon argues that this is only a legacy charged upon the estate upon the failure of an estate tail, which is not void for remoteness. But why is such a charge not void for remoteness? Merely because, being after an estate tail, it is barrable by recovery, as was the case in *Morse v. Lord Ormonde*; but, in this case, the 2000*l.* is charged  
upon

upon, or is part of, a term anterior to the estate tail, and therefore not barrable by recovery, but to be enjoyed only upon the failure of the issue male, or of the issue of daughters of one of the grandsons. There is no gift of the 2000*l.*, except in declaring the trusts of the term, and that term would not be affected by the recovery. *Eales v. Conn* (a), affirmed by the Lord Chancellor in 1831, is a direct authority upon that point, which I have no disposition to disturb. (b) It is also to be observed, that the bill expressly contends that the term and the 2000*l.* charged upon it are not barrable by a recovery. It makes the Defendant pretend that a recovery had been suffered of the estate first given to *Thomas*, and then charges that all the interests under the recovery are subject to the term; but if the term and the charge upon it be not barrable by recovery, then there is no ground for contending that the charge is not too remote.

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There is, therefore, no possible construction of the gift of the 2000*l.*, which, in the events which have happened, as stated upon the bill, would support the Plaintiff's claim. I am, therefore, of opinion, that the demurrer was properly allowed by the Master of the Rolls, and that the appeal must be dismissed, with costs.

(a) 4 *Sim.* 65.

(b) See also *Roper v. Hallifax*,  
8 *Taunt.* 845. see 869.



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Dec. 12, 13, 24.

## HILL v. GOMME.

*A.*, by deed, contracted with *B.*, that, in consideration of 100*l.* expressed to be paid to *A.* by *B.* he (*A.*) would maintain, educate, and apprentice *B.*'s child, a boy of five years, and that if he had no child of his own, *B.*'s child should, in case of his attaining twenty-one years, have all his (*A.*'s) real and personal estate at his death, subject to a life interest for his widow.

It appeared, from the circumstances of the case, probable, that

the apparent consideration of 100*l.* was not, in fact, paid, or intended by either party to be paid, and that it was stated in the deed *pro formâ* only. There was some evidence that the child was at *A.*'s house after the date of the deed, but it appeared doubtful whether the child ever lived with *A.* in the manner provided by the contract, and he soon after was residing with his father (*B.*), and the Court was satisfied that *A.* and *B.*, by agreement between themselves, abandoned the contract, and that the *status* of the child had not been altered by any thing done by *A.* in pursuance of the contract. Upon a bill filed by the child, after the death of *A.*, Held, that the contract, having been abandoned by the contracting parties, could not be enforced by the child.

Whether this Court would perform a contract by which a person, for a sum of money, deprives himself of the possibility of realising property which he can dispose of by will, and thus destroys an active motive for bettering his condition in life, *quære*.

Whether, if the contract had been so acted on by *A.* as to alter the *status* of the child, the child could have enforced the contract, *quære*.

**T**HIS case is very fully reported in the first volume of Mr *Beavan's Reports*, upon the hearing at the Rolls (*a*).

The Master of the Rolls having dismissed the bill with costs, the Plaintiff appealed from his Lordship's decree.

Mr. *Richards* and Mr. *G. L. Russell* for the Plaintiff.

Mr. *Tinney*, Mr. *Wigram*, Mr. *Chandless*, Mr. *Weld*, Mr. *Mylne*, Mr. *Armstrong*, and Mr. *S. Atkinson* for the respective Defendants.

The Plaintiff's counsel referred to *Dutton v. Pool* (*b*), *Doe v. Knight* (*c*), *Exton v. Scott* (*d*), *Murless v. Franklin* (*e*), *Crabb v. Crabb* (*g*), *Knatchbull v. Fearnhead* (*h*),

*Dyer*

(*a*) 1 *Beav.* 540.

(*e*) 1 *Sw.* 13.

(*b*) 1 *Ventr.* 318.

(*g*) 1 *Mylne & Keen*, 511.

(*c*) 5 *B. & C.* 671.

(*h*) 3 *Mylne & Craig*, 122.

(*d*) 6 *Sim.* 31.

*Dyer v. Dyer* (a), *Kilpin v. Kilpin* (b), *Martyn v. Hind* (c),  
*Lamplugh v. Lamplugh* (d), *Ellis v. Nimmo* (e), *Colyear*  
*v. Countess of Mulgrave* (g), *Veitch v. Jones*. (h)

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The Defendant's counsel mentioned *Ex parte Williams* (i), *Ex parte Peele* (k), *Johnson v. Legard* (l), *Sutton v. Chetwynd* (m), *Colman v. Sarel* (n), *Ellison v. Ellison* (o), *Pulvertoft v. Pulvertoft* (p), *Ex parte Pye* (q), *Edwards v. Jones* (r), *Blake v. Leigh* (s), *Garrard v. Lord Lauderdale* (t), *Stratford v. Lord Aldborough* (u), *Flower v. Marten*. (x).

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*The LORD CHANCELLOR.*

Much of the difficulty in which this case has been involved, would, I think, be removed, if an accurate notion could be first formed of the situation of *James Dean*, against whose estate a specific performance of his covenant is sought. As against him, the bill is for a specific performance of a contract for the sale of all the real and personal estate of which he might be seised or possessed at the time of his death. The consideration for this was, nominally, so much of 100*l.* as might remain after

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| (a) 2 <i>Cox</i> , 92.                  | (l) <i>Turn. &amp; Russ.</i> 281.                  |
| (b) 1 <i>Mylne &amp; Keen</i> , 520.    | (m) 3 <i>Mer.</i> 249.                             |
| (c) <i>Cowp.</i> 437.                   | (n) 1 <i>Ves. jun.</i> 50.                         |
| (d) 1 <i>P. W.</i> 111.                 | (o) 6 <i>Ves.</i> 656.                             |
| (e) 1 <i>Ll. &amp; Goo. temp. Sugd.</i> | (p) 18 <i>Ves.</i> 84.                             |
| 353.                                    | (q) 18 <i>Ves.</i> 140.                            |
| (g) 2 <i>Keen</i> , 81.                 | (r) 1 <i>Mylne &amp; Craig</i> , 226.              |
| (h) <i>Rolls</i> , May 1st, 1829, un-   | (s) 1 <i>Ambl.</i> 306.                            |
| reported.                               | (t) 3 <i>Sim.</i> 1., 2 <i>Russ. &amp; Mylne</i> , |
| (i) <i>Buck</i> , 13., and the note to  | 451.   |
| that case.                              | (u) 1 <i>Beatty</i> , 228.                         |
| (k) 6 <i>Ves.</i> 602.                  | (x) 2 <i>Mylne &amp; Craig</i> , 459.              |

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maintaining and educating and placing out as an apprentice a boy of five years old. No doubt, it was possible, that the child might die, and so those expenses might be saved; but, looking to the chances of a child of five years attaining twenty-one, and the necessary expenses of his maintenance and education, and of placing him out as an apprentice if he should live, it will be found that no part of the 100*l.*, if paid, could be referred to the purchase of the real and personal estate of *James Dean*, whatever it might be. It is, however, unnecessary to pursue this inquiry; because, if the cause turned upon the evidence of the fact of the 100*l.* having been paid, I should be of opinion that the evidence not only did not prove that payment, but was strong to disprove it. It is, in the first place, proved, that a money consideration formed no part of the original agreement between the parties; but they were advised that the transaction must have the appearance of being founded upon a valuable consideration. It is not very probable that the parties should so far depart from their original agreement as to pay 100*l.* for a contract which the other party was willing to execute for nothing; but it was the obvious consequence of the advice given, that it should be made to bear the appearance of some valuable consideration being paid. The fact of payment is directly in issue, and was known to be the foundation of the Plaintiff's title; but no evidence is given of the payment, except the receipt, which, under such circumstances, is of no value. It is, however, proved, that no money was paid before the receipt was signed; but if *Thomas Hill's* recollection of what took place nearly twenty years before he made his deposition be correct, *John Hill* afterwards said he believed that the business was concluded, except paying the money, and that he put his hand into his pocket, as if he were going to produce the

the money when the witness left the room—a remark and act not inconsistent with the supposition that the 100*l.* had been inserted at the suggestion of counsel, without any intention that it should be actually paid, as the parties may be supposed to carry on the farce up to the very act of payment.

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Supposing, however, that the money was paid, it is a bill for a specific performance of a contract to convey and assign all the real and personal estate. Freehold estate there was none; but there were leaseholds of which the Defendant *Vaile* became purchaser in 1828, without any notice of the Plaintiff's title, as he alleges, and there not being any proof of his having had any such notice. The rest of the property consisted of chattels and other things, for which a bill for a specific performance of a contract to sell would not lie. But suppose these objections not to exist, is it clear that this Court will decree a specific performance of such a contract as this, by which, for a certain sum, a party deprives himself of the possibility of realising property over which he can have a disposing power by will, and the effect of which, therefore, is to destroy the most active motive for bettering his condition in life? *Prebble v. Boghurst* (a), and the other cases upon which it was founded and which have followed it, have no analogy to such a case as this. In those cases, marriage was the consideration, and the parties claiming the benefit were the children of that marriage; but, here, the child to be benefited was a total stranger to the party contracting to divest himself of all power over his property. As between him and the other parties, there was no consideration, meritorious or otherwise, except the remnant, if any, of the 100*l.* In *Hobson v. Trevor* (b), the

(a) 1 *Swanst.* 509. 580.(b) 2 *P. Wms.* 191.

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the parties to be benefited were the daughter of the contracting party, her husband and children.

Let it, however, be assumed, that the contract was such as this Court would enforce, and that a valuable consideration was paid for it — the parties to the contract were the Plaintiff's father and *James Dean*; the party to be benefited was, indeed, the son, but it cannot be that the parties to the contract are, for that reason, to be precluded from dealing with each other upon the subject of the contract. The vendor knew nobody but his purchaser, and it cannot affect his rights that the purchaser gives to any one else the benefit of his contract.

Cases of advancement have been referred to as analogous to this. All those cases are between the parent and the child, and those who claim through them, and, in all, the question is, whether the father's equity to consider a person to whom his estate has been conveyed without consideration, as a trustee for him, is not repelled by the child's title to have the transaction considered as an advancement. Here, the question is, not who would be entitled, as between the father and son, to the fruits of the contract, if enforced, but whether the son can enforce it against a stranger. In *Prebble v. Boghurst*, and the other cases of that description, the consideration being marriage, the children of the marriage were Plaintiffs; but, in all marriage contracts, the children of the marriage are not only objects of, but *quasi* parties to it.

But, going back to 29 *Car. 2.*, the case of *Dutton v. Pool* (a) has been produced as an authority for this Plaintiff's right to sue. Of the Plaintiff's right to sue

(a) 1 *Ventr.* 518. 552.

sue at law, in that case, I say nothing: there was much difference of opinion amongst the judges who decided it; but the facts of that case would, I conceive, give to the Plaintiff an undoubted right to relief in this Court, though upon a principle which has no application to the present case. A father, seised in fee of land, was about to cut down timber upon it, to raise 1000*l.* for his younger child. His son and heir, in consideration of his not cutting down the wood, promised to pay 1000*l.* to such younger child; that is, in consideration of the father permitting this property to descend, the son promised himself to do what the father was about to do out of it. In *Chamberlain's case* <sup>(a)</sup> a father being about to make a will, and thereby to make certain provisions for his younger children, the son and heir persuaded him not to make any such will, and that he would take care his brothers and sisters should have those provisions, whereupon the father forbore to make the provisions, and they were decreed against the heir. *Dutton v. Pool*, therefore, is no authority in support of the Plaintiff's attempt to make the Defendant liable to him for the performance of the contract entered into with his father.

If, indeed, the agreement had been so far acted upon, as to have altered the *status* of the child, as it was observed by the Master of the Rolls, and that by the act of *Dean, Dean* might have been precluded from disputing with the child his liability to perform his part of the agreement; but that would have been a new equity, though arising out of the agreement, and which the facts of this case exclude. Let it, however, be assumed, that this Court would permit him to sue upon such contract,

(a) *Pre. Cha.* 4.; and see *Freem.* 34.

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contract, it cannot be that such right or the reservation of the benefit to him under the contract, should prevent the parties to the contract from dealing with each other relative to it. If, in *Dutton v. Pool*, the father, after the undertaking of his son, had cut down the wood, and had not applied the proceeds for the benefit of the daughter, it cannot be supposed that the son would have been liable to her for the 1000*l*. The contract, therefore, between *James Dean* and *John Hill* was liable to be affected by their acts towards each other, notwithstanding the benefit which the Plaintiff was to take under it. The intention of the father so to benefit the child was, indeed, manifested by the agreement, but nothing more, and could not affect the rights or equities of the other party to it.

It is necessary, therefore, to look to the conduct of the parties, and particularly of the father. If the 100*l*. was given by the Plaintiff's father for the covenant on the part of *Dean*, part, at least, of the consideration for that payment was the being relieved from the expenses of maintaining and educating the Plaintiff; and part of the benefit *Dean* was to receive was the society of the child. I think the observations of the Master of the Rolls upon the evidence addressed to this part of the case, are perfectly just, and that the evidence of the agreement having been acted upon at all is very insufficient to establish that fact; but that it is amply proved that both parties so far abandoned the contract, soon after it was made, that neither party derived the benefit from it which it purports to secure, so that, as between the two contracting parties, it would be impossible for the representatives of either to demand, in this Court, a specific performance of it. The claim of the Plaintiff, as assignee of the debt, supposed to consist of the value  
of

of the maintenance of the Plaintiff during his minority, is so wild, as scarcely to have been made the subject of argument ; but if the father had the power to abandon and rescind that part of the contract which provided a benefit to his son, and which, I think, he had, then his acts and conduct operate upon this part of the contract as well as the other, and this ground alone would, I think, afford an answer to the Plaintiff's bill. I think, therefore, it was properly dismissed, and that the appellant must pay, to the respondent, the costs of this appeal.

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As the Plaintiff sued and appealed in *formá pauperis*, he could not be ordered to pay the costs, and, therefore, the order made upon the appeal was, simply, that the petition of appeal should be dismissed.

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1840.

## BETWEEN

*May 1.*  
*Nov. 19.*

SARAH HEIGHINGTON, EDWARD HEIGH-  
INGTON, JOHN HEIGHINGTON, MAR-  
THA JANE HEIGHINGTON, and ROBERT  
HEIGHINGTON the Younger - Plaintiffs;  
JOHN GRANT and WILLIAM GORE

Defendants;

## AND BETWEEN

SARAH HEIGHINGTON and MARTHA JANE  
HEIGHINGTON - - - Plaintiffs;  
EDWARD HEIGHINGTON and JOHN HEIGH-  
INGTON - - - Defendants;

## AND BETWEEN

SARAH HEIGHINGTON, EDWARD HEIGH-  
INGTON, JOHN HEIGHINGTON, and WIL-  
LIAM FARROW, and MARTHA JANE, his  
wife - - - Plaintiffs,  
JOHN GRANT - - - Defendant.

By original and amended bills and bills of revivor.

Under a di-  
rection, in a  
decree, that  
the Master  
shall ascertain  
balances in the  
hands of a  
party at the  
end of each  
year, and shall  
compute in-  
terest on such

**B**Y the decree made in the first mentioned cause, by  
Sir *John Leach*, Master of the Rolls, on the 4th  
of *June 1832*, the bill was dismissed, as against the De-  
fendant *Gore*, with costs, and it was referred to the  
Master to take an account of the personal estate, not  
specifically bequeathed, of *Robert Heighington* the tes-  
tator,

balances, and shall "in taking the said accounts" make annual rests, followed by  
a direction that the party shall be charged with interest "after the rate and in  
manner aforesaid upon such balances:" the interest computed on the balance due  
at the end of the first year is to form part of the balance due at the end of the  
second year, and upon which interest is then to be computed, and so on from year  
to year, to the end of the account.

tator, in the pleadings named, come to the hands of the Defendant *Grant*, one of his executors, or to the hands of any other person or persons by his order or for his use; and it was ordered that the Master should ascertain what balances of the testator's monies and estate remained in the hands of the Defendant *Grant* unapplied, at the end of twelve months from the testator's death, and also what balances had remained in his hands at the end of each year since the time before mentioned, after giving credit for such sums of money as he should have paid, applied, or advanced, in the administration of the testator's estate, or to or for the use of *Sarah Heighington*, the testator's widow, and her children, including all sum and sums of money paid or advanced by him for her or their use to the *Leighton Buzzard* bank. And it was ordered that the Master should compute interest at the rate of 5*l.* per cent. per annum on the balances which should appear to have been in the hands of the Defendant *Grant* at the end of each year since the time aforesaid; and the Master, in taking the said accounts, was to make annual rests: and it was ordered that the Defendant *Grant* should be charged with interest, after the rate and in manner aforesaid, upon such balances, accordingly; and it was referred to the Master to tax the Plaintiffs their costs as to so much of the suit as sought to charge the Defendant *Grant* with interest on the balances from time to time remaining in his hands as before mentioned; and it was ordered that such costs, when taxed, should be paid by the Defendant *Grant*. The usual directions were given for production of books and examination of witnesses upon interrogatories, and for making just allowances. Further directions, and the rest of the costs of the suit were reserved. And it was ordered that the Attorney-General should be furnished with a copy of the proceedings in the cause, by the Plaintiffs or their solicitor,

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solicitor, and also be at liberty to attend the Court on the hearing of the cause for further directions. And any of the parties were to be at liberty to apply to the Court as they might be advised.

On the 11th of *February* 1839, the Master made his report, in pursuance of this decree, and thereby found that there had come to the hands of the Defendant *Grant*, or some person or persons by his order, or for his use, in respect of the personal estate of the testator not specifically bequeathed, the sums of money mentioned in the first schedule to the report, amounting, together, to the sum of 466*l.* 13*s.* 10*d.*, with which he had charged him accordingly; and that *Grant* or some person or persons on his account, had paid, in discharge of debts, funeral expenses, and legacies, and otherwise, on account of the said estate, in a due course of administration, the sums of money mentioned in the second schedule to the report, amounting together to the sum of 4755*l.* 11*s.* 3*d.*, which he had allowed to the Defendants accordingly, and which included the sum of 1179*l.* 7*s.* 11*d.* paid by him into the Bank, with the privity of the Accountant-General, to the credit of the first-mentioned cause, on the 1st of *July* 1831, under an order of the 22d of *June* 1831. And he found that after deducting the amount of the first schedule from the amount of the second schedule, there would appear to be due to the Defendant *Grant*, to balance his account in respect of the personal estate of the testator, not specifically bequeathed, the sum of 92*l.* 17*s.* 5*d.*: and the Master stated that he had examined the particulars of *Grant's* receipts and payments set forth in the first and second schedules, and made annual rests therein; and he found that the testator died on or about the 14th of *February* 1814, and that on the 14th of *February* 1815 there was not any balance in *Grant's* hands, in respect  
of

of the testator's monies and estate; but on that day, and also on the 14th of *February* 1816, the payments made by him had exceeded his receipts, and that on the 14th of *February* 1817 there was a balance of 1386*l.* 18*s.* 5*d.* in his hands, in respect of the said monies and estate; and that there was also, at the end of each succeeding year, a balance remaining in his hands, after giving him credit for such sums of money as in the decree mentioned, up to the 1st of *July* 1831; and that on the 1st of *July* 1831, the balance in his hands was the sum of 1086*l.* 10*s.* 6*d.*; and that, pursuant to order of the 22nd of *June* 1831, *Grant*, on the 1st of *July* 1831, paid into Court 1179*l.* 7*s.* 11*d.*, being an excess of 92*l.* 17*s.* 5*d.* beyond the before-mentioned balance, and that he did not afterwards receive any sum of money on account of the testator's estate; and the Master stated that he had computed interest, at the rate of 5*l.* per cent. per annum, upon the balances in the hands of the Defendant, at the end of each year since the time before mentioned, up to the 1st of *July* 1831; and he found that such interest amounted 753*l.* 7*s.* 4*d.*, and he had, in the third schedule to his report, set forth the particulars of the balances and of the interest so computed thereon, the first column in such schedule containing the balances, and the second column containing the interest computed thereon. And he certified that he had taxed such of the Plaintiffs' costs as he was directed by the decree to tax, and that he had made a separate report of them, and that they amounted to 130*l.* 11*s.* 6*d.*

It appeared, by the third schedule to the report, that the Master had computed simple interest only upon the balances from time to time in the Defendant's hands, and that he had not included the interest upon the balance of one year in the amount of the balance of the

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the next year. The simple interest computed by the Master amounted, in the whole, to 753*l.* 7*s.* 4*d.*

The Plaintiffs took four exceptions to the report.

The first exception submitted that the Master had not charged the Defendant with interest, on the balances, and in the manner, directed by the decree.

The second exception submitted that the Master ought to have found that the interest on the yearly balances amounted to a much larger sum than the 753*l.* 7*s.* 4*d.*, with which he had charged the Defendant for interest on balances.

The third exception submitted that the Master ought to have included in each balance the interest computed and charged against the Defendant on the preceeding yearly balance or balances.

The fourth exception submitted that the Master ought not to have allowed to the Defendant sums amounting to 34*l.* for bankers' commission paid to the *Leighton Buzzard* bank, as he, the Defendant, was a partner in that bank.

Upon these four exceptions coming on to be argued before the Master of the Rolls, his Lordship overruled the three first, and allowed the last, and directed that the deposit should be divided between the Plaintiffs and the Defendant *Grant*.

The Plaintiffs now appealed from so much of this order as overruled the three first exceptions, and they insisted that those exceptions ought to be allowed.

Mr.

Mr. *Richards* and Mr. *Keene* appeared in support of the exceptions.

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Mr. *Wigram* and Mr. *Lloyd* appeared for the Defendant *Grant*.

*Raphael v. Boehm* (a), *Binnington v. Harwood* (b), *Wilson v. Carmichael* (c), *Cotham v. West* (d) were cited.

*The* LORD CHANCELLOR.

Nov. 13.

This question turns entirely upon the construction to be put upon the terms of the decree. If the terms used have received a judicial exposition, and have obtained a technical meaning, the decree must be construed accordingly; and it will not be of importance whether such a meaning be or be not consistent with the natural construction of the terms used; but if the judicial exposition of those terms be consistent with the obvious and natural meaning, every ground of difficulty is removed.

The decree directs the Master to take, first, an account of the personal estate received by the Defendant, the executor, and to ascertain what balances of such estate remained in his hands, unapplied, at the end of each year, after giving credit for proper payments; and, secondly, he was to compute interest at 5*l.* per cent. upon such balances; and, thirdly, in taking the accounts, he was to make annual rests; and, fourthly, the Defendant was to be charged with interest, after the rate

(a) 11 *Ves.* 92.

(b) *Turn. & Russ.* 477.

(c) 2 *Dow. & Clark.* 51., 3 *Molloy*, 89.

(d) *Rolls*, Nov. 1836, reported, on other points, 1 *Beav.* 380.,

2 *Daniell's Ch. Pract.* 198.

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rate and in manner aforesaid, upon such balances accordingly.

The Master's report has ascertained the balances in the Defendant's hands at the end of each year, and charges him with the balance ultimately due, and calculates interest upon each of such balances for the year following that at which the balance is ascertained, and charges him with the aggregate of all such sums of interest, but does not add the interest of the balance of the preceding year to the balance of principal monies found due at the end of the following year.

The question is whether this was the intention of the decree, or whether, as the Plaintiffs contend, the interest upon the preceding balance ought to have been added to the balance of principal monies due at the end of the next year, so as, together, to constitute the balance of each year; and if so, then such balance, so constituted, must be the sum upon which interest for the succeeding year ought to be calculated. In the mode in which the Master has taken the account he has correctly obeyed the first and second directions of the decree. He has ascertained the balances at the end of each year, and he has calculated interest upon such balances; and, if the decree had stopped there, he would not only have done all that the decree required, but the provisions of the decree would have justified all he has done.

But, if that be so, what construction is to be put upon the two last directions in the decree, namely, that, in taking the said accounts, the Master is to make annual rests, and to charge the Defendant with interest upon the balances at the rate and in manner aforesaid?

So

So far as relates to the principal monies, annual rests had been already directed; the direction to ascertain the balance at the end of each year being equivalent, if making annual rests is to be confined to the principal monies. But the direction to make annual rests follows not only the direction to ascertain the balances at the end of each year, but the direction to compute interest upon such balances, which constitute part of the account to be taken, and, in taking the said accounts, he is to make annual rests. Is not the account so to be the subject of annual rests — the account before directed — so constituted of the balance at the end of the preceding year and interest upon it?

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It cannot be said that the interest with which the decree charges the Defendant is not strictly part of the account directed to be taken against him; and if it be part of it, then it is part of *the said* account, and the said account is directed to be the subject of annual rests.

Again, the fourth direction is that the Defendant is to be charged with interest at the rate and *in manner* aforesaid. The rate had before been fixed at 5*l.* per cent., and if nothing more were intended, and if what the Master has done were all that was intended by the decree, this fourth direction was mere repetition; but what meaning, in that case, is to be attributed to the words “in manner aforesaid?” The direction immediately preceding was to make annual rests, which, following that to charge interest at 5 per cent., would necessarily affect the mode of charging interest, if the meaning of making annual rests was to add the interest to the principal, but not otherwise; and to effect this, or to make the intention clear, the fourth direction was added.



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If, therefore, I had been called upon to put a construction upon these words, without any judicial decision to aid me, I should have found myself bound to hold that the Master had erred, and that the interest ought to have been added to the principal. But, as I understand the case of *Raphael v. Boehm* (a), Lord Eldon has decided the point, after the most careful consideration and inquiry into the practice in the Masters' offices. In that case, the order upon further directions ordered that interest at 5*l.* per cent. should be calculated upon all sums, from the time they were received, for so long as they remained in the hands of the Defendant; and that the Master do, in such computation, make half-yearly rests. The Master, under this direction, calculated the interest upon the sums, from the time they were received up to the end of the half year, and then added the amount to the principal, and from that time calculated interest upon the sum so compounded of principal and interest. The Defendant, by the third exception, complained of this, alleging that the Master ought to have stated the interest as a separate charge, and not to have added the same to the balance of principal, that is, that he ought to have done what the Master has done in the present case. Lord Eldon disapproved of the manner in which the interest had been directed to be calculated; but he overruled the exception, and thereby decided — for no other ground could have justified his order — that, in executing an order, directing a computation of interest upon items with which the accountant is charged, and that the Master, in making such computation, make certain prescribed rests, the proper course is for the Master to ascertain, at the period of the rest, what was the amount of interest then due, and to add that amount to the principal, and to calculate

(a) 11 *Ves.* 92.

calculate the subsequent interest upon the sum compounded of such principal and interest.

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It is true that *Raphael v. Boehm* was a peculiar case; but all the peculiarities belonging to it, which would affect the decision upon the Master's report, were those which were to be found in the decree itself. Those directions were peculiarly severe against the accountant, and therefore calculated to induce the Court to construe those directions as leniently towards the Defendant as possible. But Lord *Eldon*, as well from the meaning of the words as from what he found to be the general understanding in the Masters' offices, and intending, as he says, to settle the practice once for all, decided that the manner in which the Master had, in this respect, taken the account of interest, which was precisely what the Plaintiff in this case insists upon, was the right course.

It has been supposed, however, that subsequent cases have thrown doubt upon this point, and several were referred to. The first of these is *Binnington v. Harwood* (a), in which Sir *T. Plumer* is made to say, that, notwithstanding the elaborate discussion which the subject underwent in *Raphael v. Boehm*, there was considerable doubt as to the effect of a direction to make annual rests in taking accounts. What doubts he referred to is not explained; but, in the case before him, under a decree to make annual rests, he held that the accounting party ought to be charged from the day the money was received. I do not say that this was wrong in that case; but it leads to an inference that Sir *T. Plumer* did not mean that the doubts were whether such a decree ought to have a less stringent

(a) *Turn. & Russ.* 477.

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gent operation against the accountant than what had been given to it in *Raphael v. Boehm*.

In *Wilson v. Metcalfe* (a) the decree was not, as in this case, to ascertain annual balances and compute interest upon such balances, and in taking the said accounts to make annual rests, but to make annual rests in the account of rents, and to compute interest upon *such rents*. In *Tebbs v. Carpenter* (b) is the form of the decree in *Dornton v. Dornton*, in which interest was directed upon balances, but not with compound interest. It directed the Master to compute interest on the balances from time to time in hand, without any direction, as in this case, to make annual rests in taking the said accounts, and to charge interest upon such balances after the rate and manner aforesaid.

In *Cotham v. West* (c) the decree directed the Master to take an account of rents and profits, and in taking the said account to make annual rests of the clear balance, and to compute interest on such respective balances at 5*l.* per cent.; and, in making such annual rests, except the first, the Master was directed to include in the balance then stated, the interest of each preceding balance, so as to charge the Defendant with compound interest thereon. This direction is more distinct and specific than that in the decree under consideration, and it is more so than any other referred to. This is an advantage over the others; but it does not follow that directions less specific ought not to receive the same construction, except, indeed, the last words, "so as to charge compound interest thereon," which is only explanatory of the former directions.

That

(a) 1 *Russ.* 530. see 537.

(b) 1 *Mad.* 290. see 302.

(c) *Rolls*, 15th Nov. 1836.

1 *Beav.* 380 on other points.

That decree and the present differ only in words: in substance the directions are the same; in both, the direction is to ascertain balances, to compute interest thereon, to make such interest part of the rest, and to charge interest upon the balances so constituted. One way of trying this question would be to suppose a contract made in the terms of this decree, and that a merchant had agreed with his correspondent, for whom he was to receive money, that the balance in hand at the end of each year should be ascertained, and interest computed thereon at 5*L.* per cent., and annual rests made, and interest allowed at the rate and in manner aforesaid. I cannot think that there could be any doubt but that the interest of the past year would be held to form part of the next year's balance.

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I am, for these reasons, of opinion that the exceptions to the Master's report, in this respect, ought to be allowed.

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It was ordered that the deposit should be returned to the Plaintiffs, and that it should be referred back to the Master to review his Report.

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Feb. 15. 19. 21.  
Nov. 14.

DAVIES v. COOPER.

COOPER v. JACKSON.

Purchase of a contingent reversionary interest set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such.

THE object of the cause of *Davies v. Cooper* was to rescind, and of the cause of *Cooper v. Jackson* to enforce, a contract in writing made by a deceased person, *Joseph Reddish*, dated the 23d of October 1834, for the sale to *Cooper*, who had married his sister, of a contingent reversionary interest in a pecuniary fund, and of the equity of redemption of certain small real property, the consideration for which sale was to be an annuity of 120*l.*, to be paid quarterly to *Joseph Reddish* for his life.

The reversionary interest in the pecuniary fund was contingent upon the death of the sister, *Cooper's* wife, without having had a child who should live to attain the age of twenty-one years, or should die under that age, leaving issue living at the sister's death. The sister was married to *Cooper* in 1827, but had had no child, and was, at the date of the contract, thirty-five years old.

The first part of the annuity became due in *January* 1835, and was then tendered to *Reddish*; but he refused to receive it, and then repudiated the contract. He died in the month of *April* 1835, having bequeathed his property to his natural daughter, the infant Plaintiff, *Elizabeth Davies*, and having appointed the Defendant *Jackson* and another his executors.

The

The grounds upon which the contract was impeached were three,—intoxication on the part of *Reddish*, undue influence on the part of *Cooper*, who had the management to a considerable extent of *Reddish's* affairs, and inadequacy of value, regard being had to the badness of *Reddish's* life.

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The material evidence on these points is stated in the Lord Chancellor's judgment.

The two causes were heard together, by the Lord Chancellor, as original causes.

Mr. *Knight Bruce* and Mr. *Sharpe* supported the contract.

Mr. *Wigram* and Mr. *Koe*, on behalf of *Elizabeth Davies*, insisted that the contract ought to be rescinded.

Mr. *Kenyon Parker* appeared for other parties.

In support of the contract, it was contended that the doctrine of the Court, with respect to sales of reversionary interests, was inapplicable to cases in which (as in the present) the reversionary interest depended upon a contingency, such as the birth of issue; and the following cases were referred to by the counsel who maintained the validity of the contract; *Nichols v. Gould* (a), *Baker v. Bent* (b), *Ex parte Tindall* and *Ex parte Eagle* (c), *Headen v. Rosher* (d), *Potts v. Curtis* (e), *Wardle v. Carter* (g), *Gowland v. De Faria* (h), *Peacock v. Evans*,

(a) 2 *Ves.* sen. 422.

(b) 1 *Russ. & Mylne*, 224.

(c) *Mont. & Mac.* 415. 422.

(d) *M'Clel. & Younge*, 89.

(e) *Younge*, 543.

(g) 7 *Sim.* 490.

(h) 17 *Ves.* 20.

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v. *Evans* (a), *Coles* v. *Trecothick* (b), *Montesquieu* v. *Sandys* (c), *Cooke* v. *Clayworth* (d), *Neale* v. *Neale*. (e)

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Nov. 14.

*The* LORD CHANCELLOR.

The object of one of these bills is to enforce, and of the other to set aside, an agreement. By that agreement, which is dated 23d of *October* 1834, *Joseph Reddish*, in consideration of an annuity of 120*l.* to be granted by *Thomas Cooper* to him, *Joseph Reddish*, for his life, payable quarterly, and to commence from that day, agreed to assign to *Cooper* his interest in a sum of 4080*l.* to which he was absolutely entitled, subject to the life estate of *Cooper's* wife (who was then thirty-five, and had been married since 1827, but never had a child,) if she died without children, and to convey certain fee-simple property in the market-place at *Stockport*, to which he was absolutely entitled, subject to a mortgage for 1900*l.*; and the question is, whether this agreement is to be specifically performed, or whether it was obtained under circumstances which subjects those who claim the benefit of it to have it delivered up and cancelled.

When the first quarterly payment of the annuity according to this agreement became due, it was tendered to *Joseph Reddish*; but he refused to accept it; and before the second became due, that is, on the 22d of *April* 1835, he died. The bill, seeking to set aside this agreement, is filed by the natural daughter of *Joseph Reddish*, to whom, by a will dated the 30th of *August* 1834,

(a) 16 *Ves.* 512.(b) 9 *Ves.* 234.(c) 18 *Ves.* 302.(d) 18 *Ves.* 12.(e) 1 *Keen*, 672.

1834, he devised and bequeathed the whole of his property, subject to the payment of his debts.

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The grounds upon which the bill seeks to have the agreement set aside are,

1. Fraud in *Cooper*, who, it is alleged, was in the management of *Reddish's* affairs, and had great influence over him;

2. Imbecility in *Reddish*, from long continued habits of intoxication; and that he was in that state when he signed the agreement;

3. Inadequacy of consideration, and particularly from the state of health of *Reddish*, known to all the parties, which made his life not worth two years' purchase.

That part of the question, respecting the inadequacy of consideration, which relates to the state of health of *Joseph Reddish*, creates a peculiarity in this case, which relieves it from the embarrassment generally attending cases which turn upon evidence of value, and renders it unnecessary very minutely to consider the doctrine which many cases of the highest authority have established as to purchases of reversionary interests. (a)

The first inquiry, however, must be as to the value of the property agreed to be sold, independently of its conversion into an annuity; and I will first consider the evidence as to the reversionary interest. This interest was not only expectant upon the death of *Mrs. Cooper*, but upon her dying without children, or all such children

(a) See *Ardglasse v. Muschamp*, *Linwood*, 2 *Atk.* 133.; *Henley v. 1 Vern.* 237.; *Wiseman v. Beak*, *Axe*, 2 *Bro. C. C.* 18.; *Baker v. 2 Vern.* 121.; *Barnardiston v. Bent*, 1 *R. & M.* 224—227.



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dren dying under twenty-one; but as she was thirty-five or thirty-six at the date of the agreement, and had been married eight years, and had never had a child, and as all the parties, of whom the husband was the principal, do not appear to have attached any importance to this contingency, I am of opinion that, in estimating the value of the reversion, it ought to be considered with reference only to the duration of her life. Upon this subject, Mr. *Cooper* examined Mr. *Davies*, actuary to the *Guardian*, and Mr. *Morgan*, actuary to the *Equitable Insurance Company*. The first values the reversion at 1169*l.*, and the latter at 1453*l.*, of which two sums the mean is 1311*l.* The Plaintiff's witness, Mr. *Ansell*, actuary to the *Atlas Company*, estimates the reversion at 1195*l.*, and the mean of the three is 1272*l.* If, therefore, the value be taken at the latter sum, it will be lower than the Defendant's evidence would prove it to be. This sum may, however, be reduced by the difference between the value calculated according to the tables and the market price.

There is more discrepancy in the evidence as to the value of the property in *Stockport*. The Plaintiff's witness, *Fletcher*, a builder, estimates it at 2650*l.*, and her witness, *Parkinson*, a land surveyor and valuer, at 2565*l.*, the mean of which is 2607*l.*; but the Defendant's witness, *Broadhurst*, described as an architect, estimates the property at 2016*l.*, and *Hunt*, described as a builder, but only twenty-nine years of age, at from 1800*l.* to 2000*l.*, and *Swan*, also described as a builder, at 1995*l.*, the mean of which is 2005*l.*; and the mean of this sum and of the 2607*l.*, the result of the Plaintiff's evidence, is 2300*l.* It is, however, to be remarked upon the evidence of the Defendant's witnesses, that they all state that they have known the Defendant ten years, and that they do

do not know any of the other parties, and none of them state that they have actually examined or valued the property; whereas the Plaintiff's witness, *Fletcher*, states, that he, on the 12th of *October* 1836, actually surveyed and valued the property, not for the purposes of the suit, but for the purpose of sale, and that the value he put upon it was 2650*l.*; and *Parkinson* states, that he surveyed and valued the property, also for the purpose of sale, on the 14th of *October* 1836, and, putting different sums as the value of different parts of the property, makes the value of the whole amount to 2565*l.*, and says that the value was the same in *October* 1834. It is impossible to hesitate to which of these witnesses the greatest weight ought to be given; independently of which, *Cooper's* bill states, that this property had, some time previous to 1834, been accepted as a security for 1900*l.*, within about 100*l.* of the supposed value, which is in the highest degree improbable. It will, however, be sufficient, for the present purpose, to take the value as 2300*l.*, the mean between the result of the evidence for the Plaintiff, and that for the Defendant, which, deducting the 1900*l.* mortgage, leaves, as the subject of sale, property of the value of 400*l.*; and this, added to the 1272*l.*, makes the total subject-matter of the contract equal to 1672*l.*, or something less, according to the different mode of estimating the reversion. It was of the essence of the contract that this value of the property should be paid in the shape of an annuity for the life of the vendor; and that annuity was fixed at 120*l.*, being, as nearly as possible, fourteen years' purchase. The bill put in issue directly, and with many particulars, that the vendor, from long continued intoxication, was, in *October* 1834, reduced to such a state of disease and infirmity, that his life was not worth two years' purchase; and that this was evident not only to medical persons, but to all who saw him; and, of his

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his domestic habits, it is stated, that he never went to bed sober, and never got up without having previously drunk a quantity of spirits; and that *Cooper* knew all this, and often said, that he could not live long. All these allegations the Plaintiff proved by many witnesses; but of these, the most important are the two surgeons, *Jeremiah Renshaw* and *Edmund Ryle*. The first attended him in *September* and *November* 1834, and states that in *September* he was labouring under *delirium tremens* and dropsy from excessive drinking; that, in *October*, all the symptoms were aggravated; and that he does not believe he could then under any circumstances have recovered, and that the state of his health and constitution was apparent to every one, and that his life was not worth one year's purchase. Mr. *Ryle* gives similar evidence of his state up to *March* 1834, and says that it was then probable that he would not live twelve months; that he afterwards grew worse, and appeared to be gradually sinking; that he was shrunk in size; that his hands trembled, and his legs were swelled.

This case, so charged and proved, is not attempted to be met by the evidence of the Defendant. It may, indeed, be said, to be admitted; for many witnesses are examined who speak to his domestic habits, and all admit his continued intoxication; but many of them, in the same words, say that he was "generally and fully competent to manage his affairs when sober," and that he was so expert in the exercise of his favourite vice, that he always refused to do any business after he had been drinking. But what is conclusive as to the credit to be given to the statement of Mr. *Renshaw* and of Mr. *Ryle*, is the evidence of Mr. *Wright*, a surgeon examined by the Defendant, who states that he knew *Joseph Reddish* for sixteen years before his death,  
 and

and attended him professionally up to *March* 1834, and saw him frequently afterwards till his death. He gives the same account of his being "generally and fully competent to manage his affairs when sober:" but as to what is so distinctly charged in the bill as to his state of disease and debility from excessive drinking, and as to the impossibility of his surviving long, and his situation being visible to every one, not one word is said by this witness or by any other examined by the Defendants. I am, therefore, bound to assume that the witnesses for the Plaintiff have correctly represented that this *Joseph Reddish* was, in *October* 1834, in the last stage of debility and disease from the long continued use of ardent spirits, and that there was no chance of his recovery, or of his living many months; and that this was known to all about him, and particularly to his brother-in-law *Cooper*, who often stated such to be his opinion, and who had assumed, in a great degree, the management of his affairs: and, under these circumstances, I find a contract to sell to *Cooper* property worth about 1672*l.* for an annuity of 120*l.* for the life of this dying man, of which about 1272*l.* was the value of a reversionary interest.

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This is a transaction which, if the whole had been property in possession, would have come within that degree of inadequacy of consideration which has been considered as evidence of fraud; and when it is considered, that *Cooper*, from his connexion with the vendor, and from his interference in his affairs, must have had much influence over him, and that the improbability of his living, however palpable to others, was but little likely to be credited or suspected by himself, it appears to me that, in holding that this transaction cannot stand, I am not putting to the test any of the principles of this Court upon which any question has been

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been raised. The absence of all attempt to disprove the case so made by the bill as to the state of *Joseph Reddish* in 1834, throws much discredit upon some of the witnesses of the Defendant. If the case so made were not true, it would have been most easy to disprove it, by the witnesses examined by the Defendant, and by others; and if it be true, what credit can be given to the evidence of the witnesses examined by the Defendant to prove that they advised *Reddish* to complete the contract, such as *James Booth*, *William Wright*, *William Woollam*, *Henry Coppock*, and *Joseph Clay*. I observe, however, that some of them speak of the annuity of 120*l.* having been the consideration for the reversionary interest only, and that *Reddish* so understood it. *James Booth* and *William Wright* give distinct evidence as to this.

Some attempt was made to represent *Henry Coppock* as having been called in as a referee between the parties at the time of the agreement. I cannot do that gentleman the injustice to suppose that he acted in that character. It is clear, from his own account of the transaction, that he was acting for his client, Mr. *Cooper*, by whom he states that he was sent for. It is not possible to suggest any such apology for the course pursued by \* \* \* \*. He states that he, at one time, advised *Reddish* to take 100*l.* per annum for the reversionary interest, and that he was very instrumental in getting the agreement ultimately signed. Unless there was some motive for this conduct, which has not been discovered, it is impossible to account for it. Without any means taken to ascertain the value of the property at *Stockport*, or of the reversionary interest, and with the manifest impossibility of *Reddish* living many months, this supposed friend of his succeeds in inducing him to sell both, and to buy a life annuity at fourteen years' purchase. Upon cross examination,

examination, he says, that he did this without any knowledge of the manner of calculating reversionary interests, and after *Reddish* had told him that he thought his life a good one, which, he says, he himself thought was the case, and that he was likely to live many years, and that he was in a good state of health in *October* 1834, and more likely to live than his sister, who was very ill. This statement as to *Joseph Reddish* is what the Defendant has not attempted to prove, and is certainly false; and if what he states as to the sister be true, it would only shew that the inadequacy of the consideration for the reversion dependent upon her life was much greater than I have supposed it to be. It is impossible to account for the conduct of this man, as stated by himself; he must either have been, in *October* 1834, in the interest of *Cooper*, as he evidently was when examined, or if he intended to act as the friend or adviser of *Reddish*, his ignorance and misconduct in performing the office he had undertaken, adds an additional reason against the performance of the contract.

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Many cases were referred to, which do not appear to me to be applicable to the facts as proved. There is no question here as to whether, in sales of reversionary interests, the value is to be estimated according to the tables or the market price. It will be impossible, in either mode of calculation, to make this a reasonable transaction. It is true that, in sales of property in consideration of an annuity, this Court has decreed a specific performance, notwithstanding the death of the annuitant; and my decision in this case is not founded upon any doubt as to the soundness of that doctrine: but, in such a case, the Court will inquire, with some jealousy, as to the fairness of the transaction, as was

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done in *Mortimer v. Capper* (a); and the decision in *Pope v. Roots* in the House of Lords (b) (the grounds of which do not distinctly appear) seems to shew that the Court requires a clear case for a specific performance under such circumstances.

Upon the whole, I find that I have to decide upon a contract for the purchase of a reversionary interest at a very inadequate price, a contract by which a dying man, known to be so by those with whom he was dealing, but believing himself to be a good life, agreed to sell property worth between 1600*l.* and 1700*l.* for an annuity upon his own life of 120*l.*; that those with whom he was dealing were his nearest connections, and who had, in some degree, at least, interfered in the management of his affairs; and that the only person who can be considered as acting for him in the sale was totally ignorant of the value of the subject matter of the sale, and, according to his own statement, alone ignorant of the state of health of the vendor, which made the consideration to be paid for the property sold of no value whatever.

The bill for a specific performance must be dismissed with costs, and a decree made in the infant's suit as prayed, with costs. (c)

(a) 1 *Bro. C. C.* 156.

(b) 7 *Bro. P. C.* 184.; 1 *Bro. P. C.* 370. *Toml.* ed.

(c) See *Brealey v. Collins*, 1 *Younge*, 317. *Butler v. Mulvihill*, 1 *Bligh*, O.S. 137. *Kendall*

*v. Beckett*, 2 *Rus. & Mylne*, 88.

*Hincksman v. Smith*, 5 *Russ.* 433.

*Davis v. Marlborough*, 2 *Swans.*

108., and cases at p. 139. n. *Turner v. Harvey, Jacob*, 169.

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**I**N the month of *September* 1832, the Plaintiff (*George Hawksworth*), and the Defendant (*Thomas Brammall*), agreed to become copartners, as file makers, at *Sheffield*, under the firm of "*Brammall and Hawksworth*," for seven years from the 7th of *September* 1832; and the terms of their partnership were expressed in a deed dated the 9th of *September* 1832.

Award of arbitrators enforced in equity, although the submission to arbitration was to be made a rule of a court of common law.

In the month of *May* 1837, it was agreed between the Plaintiff and Defendant that the partnership should be dissolved, and, accordingly, a memorandum in writing, dated the 23d of *May* 1837, was made between them, by which, after reciting that they had, for some time past, carried on the business of file manufacturers in partnership, under the provisions of the deed of the 9th of *September* 1832, and that they were jointly interested in partnership property of considerable value, consisting of stock in trade, working tools, implements and utensils of business, and book and other debts, and the tenant-right of certain warehouses, workshops, tenements, and premises in *Sheffield*, where the trade had hitherto been carried on, until the 7th of *September* 1839, and that they had agreed that the partnership should cease and be dissolved, on or from the 1st day of *July* then next, and that the same should be so dissolved and determined upon the terms, and under and subject to the stipulations, conditions, agreements, and matters of arrangement thereafter mentioned, expressed, and declared—it was witnessed that the parties covenanted with each other, 1st, that the copartnership should, upon and from the

Award enforced, although made after the prescribed time, where both parties had, without objection, allowed the arbitrators to proceed after that time.

Where an agreement provides that various things shall be done by the respective parties, and that if any disputes shall arise with respect to them, such disputes shall be settled by particular persons as arbitrators, the award of the arbitrators need not embrace any more of the matters provided for by the agreement than are brought before them by the parties.



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1st of *July* then next, wholly cease, determine, and be dissolved, to all intents and purposes whatsoever, and that notice of the intended dissolution, under the hands of the parties, should immediately thereafter be given, and inserted in the *London Gazette*, and in such other manner as they (the parties) should think fit and agree upon, or should be determined and decided by the arbitrators or umpire thereafter named and appointed; 2dly, that an account in writing of all monies, goods, wares, merchandize, and effects or things, of or belonging to the parties, and of all debts due by, from, or to them, and all sums, profits and losses, accrued or accruing in respect thereof, should be forthwith taken and stated by the partners, under the inspection and superintendence, if either party so required, of *Henry Colley* and *Samuel Gardiner*, both of *Sheffield*, who should settle and determine any and every dispute or difference that might arise between the parties in respect of such account, and whose award or decision in writing should be binding and conclusive on both the parties, but if the arbitrators could not agree to settle any dispute or difference, the same should be settled and determined by an umpire, to be by them previously nominated and chosen, and whose decision in writing should be binding and conclusive on both the parties; 3dly, that immediately on the share of each party being so ascertained as aforesaid, the amount or value of *Brammall's* share should be paid to him by *Hawksworth*, and that *Brammall* should thereupon execute and deliver a proper deed of dissolution and assignment of his share to *Hawksworth*, and that such deed should contain all clauses usually inserted in instruments of the like nature, and, especially, a covenant on the part of *Hawksworth* to indemnify *Brammall* against all debts of the partnership, and a covenant on the part of *Hawksworth* to do all in his power to preserve the reputation of the mark “\* B,” then

then used by the partnership, during the time he should have power to use such mark, and not to do or suffer to be done, any act or deed by which the reputation of such mark might be prejudiced ; and also a covenant on the part of *Brammall* not to use, or give sanction or authority to any other person to use the same mark during such time as *Hawksworth* should have power to use such mark, nor do, or suffer to be done, any act whereby *Hawksworth* might be injured or prejudiced in his use and enjoyment of the benefit of the same mark ; 4thly, that *Hawksworth* should, immediately on the dissolution, become the tenant and occupier, under *Brammall* or other the owner, of all the business premises, and should pay 60*l.* per annum rent for the same, until the 7th of *September* 1839, *Brammall* or other the owner paying the rates and taxes, and *Hawksworth* keeping the premises in repair ; 5thly, that *Hawksworth* should, immediately on the dissolution, enter into an agreement with *Brammall*, engaging to employ *Brammall* thenceforth until the 7th of *September* 1839, in that branch of the business of a file manufacturer in which he had generally during the partnership been employed, and pay him weekly wages after the rate of 120*l.* per annum ; 6thly, that as well for the prevention of disputes touching the partnership, as for settling and compromising of the same, if any such should arise, and also for ascertaining the amount of the share and interest of *Brammall* in the partnership stock, property, and effects, on the 1st of *July* then next, they, *Brammall* and *Hawksworth*, would in all things stand to, abide by, perform, fulfil, and keep the determination and award of *Colley* and *Gardiner*, arbitrators agreed upon to award concerning all and every the matters that might arise in question or dispute as aforesaid, and all actions, suits, accounts, disputes, and matters in difference whatsoever, already or thereafter to be had between the parties relating or

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incident to, or arising out of the partnership or the dissolution thereof, so as the arbitrators made their award in writing, ready to be delivered, on or before the 1st of *August* then next, or such enlarged time as therein mentioned; and that if the arbitrators should not make their award within the time above mentioned, they, *Brammall* and *Hawksworth*, would perform the award of such one indifferent person as the arbitrators should by writing under their hands appoint for umpire before they proceeded upon the matters of the reference, provided the umpire should make his award in writing in manner aforesaid within one calendar month next after his appointment, or such enlargement of time as after mentioned; and that it should be allowed to the umpire to take as settled such of the matters referred as should be agreed upon by the arbitrators; and that the parties would produce books and papers to the arbitrators or umpire, and that the arbitrators or umpire might examine the parties, or their witnesses, on oath, or, in case of *Quakers*, upon affirmation, to be administered by some commissioner for taking affidavits in the Court of King's Bench, or not on oath or affirmation, as the arbitrators or umpire should think proper; and that the arbitrators or umpire might proceed *ex parte* in case of default in attending them or him, and that if either party should wilfully hinder or prevent the arbitrators or umpire from proceeding in the reference or making the award, such party should pay such costs as the arbitrators or umpire should direct; and that the arbitrators or umpire might enlarge the time for making their or his award, if they or he should think fit; and that the present agreement, and the submission thereby made, should and might be made a rule of the Court of King's Bench, on the promotion of either of the parties, in pursuance of the statute; 7thly, that all the expences of the present agreement, the reference and submission,  
 and

and all other expences touching the matters therein-before mentioned, should be borne by the parties equally; lastly, that each party should be bound in the penalty of 500*l.* for the performance of the present agreement.

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The partners proceeded to take the account provided by the agreement last mentioned, and, in so doing, they found that the services of the arbitrators would be necessary, but that one of them, viz. *Gardiner*, was absent from *Sheffield*, and was likely to continue so for some time, and, therefore, by an agreement in writing, dated the 31st of *July* 1837, they revoked the appointment of *Gardiner* as one of the arbitrators, and substituted one *Wm. Thompson* in his stead, and declared that the nomination of *Thompson* should be without prejudice to the previous agreement, which should remain in full force, and that neither that agreement nor any award to be made in pursuance thereof should be open to objection by reason of the substitution of *Thompson* in the place of *Gardiner*.

The arbitrators, *Colley* and *Thompson*, accordingly, met the Plaintiff and Defendant, and entered upon the investigation of various matters referred to them, and employed an appraiser to value some of the particulars in question, and on the 15th of *August* 1837 they made their award in writing, by which they stated that they had considered the various matters submitted to them, and agreed as follows:—1st, That *Hawksworth* should take the unfinished, forged, and ground files at the calculation of the cost of each sort respectively made by the committee of file makers, who made the new list of prices last year, adding to such calculations one penny in the shilling, in the wages of forging, for the cost of coles and tools: 2dly, That *Hawksworth* should take the stock of finished files, except those marked in the

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stock-book as *B. W.* and *B.* at the list of prices by which they usually sell, from which list 37 per cent. discount was to be taken and allowed to *Hawksworth* : 3dly, That from the two sorts excepted above, 10 per cent. more discount should be taken, on account of their being of inferior quality : 4thly, That the stock of cut files unhardened, and also the hardened files which wanted hot-setting, should be counted thirteen to the dozen, and reckoned as finished files, and the same discount allowed as from finished files, 37 per cent. 5thly, That *Hawksworth* should take to the working tools and fixtures at the valuation made by Mr. *Septimus Clayton* : 6thly, That *Hawksworth* should be allowed from all the debts of the partnership (except workmen's debts) which were owing at the end of *June* last,  $2\frac{1}{2}$  per cent. discount, and that such reduced amount should be considered the value in cash of the book debts at that time : 7thly, That *Hawksworth* should take to all debts owing to the partnership by workmen who were in the actual employment of the partnership at the end of *June* last, but not to such as had left in debt before that time : 8thly, That the foregoing prices and valuations of the partnership property should be considered the value of it in cash, and consequently that *Brammall* should be entitled to receive interest upon his share and proportion of it at the rate of 5l. per cent. per annum, from the time of such dissolution to the time or times of his share and proportion being paid out ; and that, on the share and proportion of the partnership effects of *Brammall* being paid by *Hawksworth*, together with interest as aforesaid, *Brammall* should receive the same as his full share and interest therein, and should claim no further share, profit, interest, or emolument whatsoever, except such wages for services as were provided for in an agreement made between them.

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The bill in the present cause was filed on the 30th of *December* 1837, and stated that the value of *Brammall's* interest was ascertained upon the principles stated in the award, and that *Brammall* concurred and assisted in so ascertaining it, but that in consequence of its appearing, in the result, that such interest amounted, in fact, to a very small sum of money, after taking into account all sums drawn out by him, he (*Brammall*) refused to perform the award, and in particular refused to execute a deed of dissolution, and that he insisted that the partnership was still subsisting, and had not been effectually dissolved, and that he had removed part of the Plaintiff's stock in trade from the business premises, and that, although he had received wages, for some weeks, as being in the employment of the Plaintiff, in pursuance of the agreement of the 23d of *May*, he still insisted upon being treated as a partner, and took various objections to the validity of the award.

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The bill prayed that the Defendant might be decreed specifically to perform the agreement entered into for a dissolution of the partnership upon the terms and conditions of the agreement of the 23d of *May* 1837, and to do all acts necessary to effectuate, perfect, and complete the dissolution, the Plaintiff offering to perform the agreement, and to pay to the Defendant the amount found due to him from the partnership business; and that the Plaintiff might be declared entitled to the mark before mentioned, until the time mentioned in the agreement; and that the Defendant might be restrained by injunction from possessing himself of any of the goods of the Plaintiff, or of the late partnership, and from removing them from the business premises, and from receiving the debts of the late co-partnership, or interfering or intermeddling with the property or other affairs thereof.

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The Defendant, by his answer, put in in *April* 1838, maintained that the partnership had not been duly dissolved, and was still subsisting, and insisted that the award was, amongst other objections to which it was open, unfair and insufficient, and that it had been made without giving him an opportunity of explaining the matters in difference to the arbitrators, and that the arbitrators had treated goods made to order and ready for delivery as stock in trade, and had, consequently, allowed discount upon their value, instead of treating them as book debts, as was usual in the trade in cases of dissolution of partnership, and that if they had been treated as book debts a discount of  $7\frac{1}{2}$  per cent. less would have been allowed upon them than was allowed on stock; and that the arbitrators made no allowance to the Defendant for the use of mark B., which had originally belonged to him and his family, or in respect of his share of the profits of the partnership for the unexpired residue of the partnership term, and that the arbitrators had confined themselves to such matters in difference as were particularly brought before them, whereas they ought to have investigated and decided upon all the matters mentioned in the agreement of the 23d of *May*.

The answer also alluded to the award having been made after the time for making it had expired, and without any enlargement of time.

Evidence was taken in the cause, for the purpose of shewing the manner in which the duty of the arbitrators had been discharged, and to what extent the Defendant had concurred in their proceedings, and to shew that, though the time for making the award, which was on the eve of expiring when the second arbitrator was appointed, had never been formally enlarged, the arbitrators

trators had acted, after the expiration of that time, with the knowledge and acquiescence of the Defendant, and that the Defendant at first expressed himself satisfied with the award.

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The Defendant also examined some witnesses.

The effect of the evidence on both sides is stated in the Lord Chancellor's judgment.

An injunction, in the terms of the prayer of the bill, had been granted by the Vice-Chancellor, upon motion, immediately after the institution of the suit. No motion to dissolve it was made until the cause was at issue. Upon a motion for that purpose being then made, it was ordered to stand till the hearing.

By the decree, made by the Vice-Chancellor upon the hearing of the cause, dated the 30th of *May* 1839, the injunction was continued; and it was ordered that the award of the 15th of *August* 1837, should be specifically performed; and it was referred to the Master to take an account of what was due from the Plaintiff to the Defendant on the footing of the award, and to enquire and state whether the services had been performed by and the salary paid to the Defendant pursuant to the award; and it was ordered that notice of the dissolution of the partnership should be signed by the Plaintiff and Defendant, and inserted in the *London Gazette*, and that such notice should be settled by the Master, in case the parties differed; and the Master was to be at liberty to state any special circumstances, at the instance of any of the parties, as he should think fit; and the Defendant was ordered to pay to the Plaintiff the costs of the suit up to the hearing, including the costs of the application

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to dissolve the injunction; and further directions and subsequent costs were reserved.

From this decree the Defendant appealed, and the cause thereupon came on to be reheard before the Lord Chancellor.

*Mr. Wigram and Mr. Kenyon Parker*, for the Plaintiff.

*Mr. Cooper and Mr. Walker*, for the Defendant.

The principal points made by the Defendant were, First, that the Court had not jurisdiction to enforce the award, because it was provided that the submission should be made a rule of the Court of Queen's Bench, and therefore that court had the exclusive jurisdiction over the award: Secondly, That as the time had not been duly enlarged, the Court of Queen's Bench would not recognize the award; and that this court could not enforce an award which the court of which it was to be made a rule would not take cognisance: Thirdly, That the award was not mutual, and could not have been enforced against the Defendant: Fourthly, That the arbitrators had not fairly discharged their duty, and had delegated part of it to an appraiser, and had not awarded on all matters referred to them: and, Fifthly, That the circumstances of this case shewed the award to be unreasonable, and therefore one which this court would not interfere to enforce.

The cases which the Defendant's counsel referred to were, *Auriol v. Smith* (a), *Nichols v. Chalie* (b), *Hutchison v. Hodgson* (c), *Davis v. Getty* (d), *Dawson v. Sadler* (e), *Nichols v. Roe* (g), *Wood v. Griffith*. (h)

(a) *Turn. & R.* 121.

(b) 14 *Vesey*, 265.

(c) 2 *Anstruther*, 361.

(d) 1 *Sim. & Stu.* 411.

(e) 1 *Sim. & Stu.* 537.

(g) 3 *Mylne & Keen*, 431.

(h) 1 *Swanst.* 43.

Mr.

Mr. *Wigram* was heard in reply.

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The effect of the decree is to declare the partnership dissolved, and to direct the taking of the partnership accounts upon the footing of an award. The Defendant the Appellant insisted that the award was not binding, and therefore that the partnership had not been dissolved in 1837, but was subsisting when he put in his answer, in *April* 1838. The partnership was formed in 1832, and was to continue for seven years; it would, therefore, expire in *September* 1839, but the parties agreed to dissolve it in *May* 1837, and, for that purpose, a deed was executed, dated 23d *May* 1837, the right to have which carried into execution the Plaintiff asserts, and the decree enforces, and which the Defendant denies.

This deed, by its first article, provides that the partnership shall, upon and from the 1st day of *July* then next, wholly cease, determine, and be dissolved, to all intents and purposes whatsoever. With this the arbitrators had nothing to do, except that, if the parties differed about the manner of publishing notice of the dissolution, the arbitrators were to decide upon the manner of doing it. It then provides that the accounts shall be taken and stated by the partners; but if either party required it, such accounts were to be so taken and stated by the partners, under the inspection and superintendence of two arbitrators, who were not to take or state the accounts, but only to settle and determine any and every dispute or difference which might arise between the said parties in respect of such accounts; and if any dispute or difference should arise, upon which the arbitrators

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trators could not agree, then the same, that is, the particular dispute or difference, was to be settled by an umpire. It then provided for the payment, by the Plaintiff, to the Defendant, of the amount or value of his, the Defendant's, share and interest so to be agreed or ascertained or determined as aforesaid, of and in the partnership stock, property, and effects, and the assignment by the Defendant to the Plaintiff of all such his share, and interest as aforesaid; and this deed of assignment, which was also to be the deed of dissolution, was to contain a covenant by the Plaintiff to do all in his power, during the time he should have power to use the mark B., then used by the partnership, to preserve the reputation of it, and a covenant by the Defendant not to use or authorise any one to use such mark during such time as the plaintiff should have power to use such mark, or to do any thing whereby the Plaintiff might be injured or prejudiced in his use and enjoyment of the benefit of such mark; and the parties agreed, as well for preventing disputes between the parties touching the said partnership, and for settling and composing of the same, *if any such should arise*, as also for the ascertaining and determining the amount of the share and interest of the Defendant of and in the said partnership stock, property, and effects, to abide by and perform the determination and award of the arbitrators agreed upon between the parties to determine and award touching and concerning all and every the matters that might arise in question or dispute as aforesaid, and all other matters in difference. The time allowed for making the award was the 1st of *August* 1837, but there was the usual power to enlarge the time.

Upon the execution of this deed, the parties proceeded, without the intervention of the arbitrators, to carry its provisions into effect; but questions having arisen, it was  
 found

found that one of the arbitrators named was absent, and could not attend to the subject of the reference; and the parties, therefore, by a deed of the 31st of *July* 1837, the day preceding that limited for making the award, named and appointed another arbitrator in his place. And now it is necessary to see what those arbitrators themselves say as to the manner in which the reference was conducted.

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Both the arbitrators were examined by the Plaintiff. Mr. *William Thompson* says that he was called in by both parties on the 31st of *July* 1837, and that the matters referred to him were the value at which the finished and unfinished stock, tools, and book debts should be taken;—that the quantities and quality of the finished and unfinished stock were furnished to him by the Plaintiff and Defendant jointly, and the value was fixed by the arbitrators accordingly;—that they likewise valued the book debts, according to certain data furnished by the Plaintiff and Defendant; and that the tools and fixtures were valued by a sworn appraiser, appointed with the consent of the Plaintiff and Defendant, who valued the same between the 1st and 15th of *August* 1837, in the presence of the Plaintiff and Defendant.

The other arbitrator, *Henry Colley*, gave similar evidence; and, being cross-examined by the Defendant, says that they decided upon all the matters referred to them—that they did not examine the stock and debts, nor distinguish between orders ready and those not ready for delivery, as they were not requested so to do;—that no allowance was made for the Defendant's interest in the profits of the partnership for the remainder of the term, because the arbitrators thought that he was not entitled to it, nor for the use of the mark, because the subject was not mentioned to them, but that he,  
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*Colley*, thinks that the Defendant ought to have an allowance of 50*l.* per annum for it. *Clayton*, the appraiser, states that he valued the tools and fixtures on the 14th of *August*, in the presence of the Plaintiff and Defendant, and that neither of them expressed any dissatisfaction.

Mr. *Thompson*, the Plaintiff's Solicitor, says that on the 24th of *August*, the Defendant approved of the award, and he, Mr. *Thompson*, at the desire of the Defendant's Solicitor, prepared a draft deed for the dissolution; and that a ledger account was made out by the Plaintiff in pursuance of the award, and when the result appeared, the Defendant objected to the award. There does not appear to be any thing to bind the Defendant to the account so made out; but that is not the question upon the decree appealed from. The Defendant's evidence does not, in any respect, affect this evidence for the Plaintiff. He has, indeed, examined witnesses to prove that it is customary in the trade to make a difference in valuation between orders ready and orders not ready for delivery; and to shew the value attached to the mark B; but he has not proved that any points upon either of these subjects were submitted to the arbitrators, or that, in fact, there were orders ready for delivery.

The award lays down the rule by which the value at which the unfinished and finished files to be taken by the Plaintiff was to be ascertained, and does the same as to the debts due to the partnership, and adopts the valuation of the tools and fixtures as made by *Clayton*.

The Defendant having refused to carry the agreement for a dissolution into effect, the Plaintiff filed his bill, and the decree declares the dissolution, and directs the  
accounts

accounts to be taken of what is due to the Defendant upon the footing of the award.

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BRAMMALL.

The Defendant, at the hearing and by his appeal, insists that this Court has no jurisdiction to interfere, because, 1st, the award was to be made a rule of the Queen's Bench, and 2dly, because it was not made until the time had expired : or that this Court ought not to interfere, 1st, because the arbitrators did not take an account of the stock and profits, 2dly, because the award was unreasonable, 1st, for not making allowance for the mark B, and 2dly, for not making a difference between orders ready and those not ready for delivery.

I am of opinion that the Defendant has failed in impeaching the decree upon any of these grounds.

As to the objection that the Court has no jurisdiction because the award was to be made a rule of the Queen's Bench, the proper answer has been given that this suit is to enforce the agreement upon the footing of the award, and not to set aside the award.

This distinction was recognised in *Auriol v. Smith* (a), and acted upon by Lord *Eldon* in *Wood v. Griffith* (b); the Court decreeing the specific performance of the agreement, of which the reference has ascertained some of the terms.

As to the objection that the award was not made within the prescribed time, the answer is this, that there is positive evidence of the parties having mutually abandoned that provision. The time fixed was the 1st of *August*. The substituted arbitrator was not appointed till the 31st of *July*. After the 1st of *August*

(a) 1 *Turn. & Russ.* 121.

(b) 1 *Swans.* 43.

both

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both parties concurred in the prosecution of the reference; both were present at the appraiser's valuation on the 14th of *August*; and after the award had been made on the 15th, the Defendant expressed his approbation of the conduct of the arbitrators. After such acquiescence, this Court will not permit a party to escape from the result of the reference because it proves to be contrary to his expectations. As to the objection that the arbitrators did not take the account of stock and profits, the answer is to be found in the terms of the agreement, by which they were only to decide upon such matters in dispute as might arise between the partners in taking the accounts.

As for the grounds upon which the award is alleged to be unreasonable, that is, because no allowance was made to the Defendant for the use of the mark B. by the Plaintiff, and because no difference was made in the valuation of orders ready and not ready for delivery; the answer is, that the arbitrators were only to decide upon matters in dispute, and that no question was put to them upon either of those subjects. It is proved that the quantities and particulars of finished and unfinished stock were made out by the Plaintiff and Defendant jointly, and both were made the subject of a valuation as such. If the Defendant had any ground for a favourable distinction of one part over the other, that was the time and opportunity of asking the judgment of the arbitrators upon such claim; nor does it appear that there was any evidence before them by which they could themselves have made the distinction, nor is there, indeed, any evidence in the cause, to prove the fact upon which the objection rests.

Similar observations apply to the objection as to the mark B. No dispute arose as to the compensation now  
claimed

claimed by the Defendant on account of the Plaintiff's use of that mark, which, by the articles of dissolution, he agreed to assign to the Plaintiff, without, in terms, stipulating for any price or compensation for it; all that he stipulated to be paid for was his share of all monies, goods, wares, merchandizes, effects, and things, and debts, and gains, and profits. No such dispute arose, because no such claim appears to have been made; and no reference, therefore, was made upon the subject, to the arbitrators, whose jurisdiction was limited to what should become matter of dispute and difference, and of reference to them. It is, therefore, impossible to impeach their award because it did not include this subject matter; and the validity of the award, so far as it goes, is now the only subject for consideration.

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What questions may arise in taking the accounts directed by the decree, it would be premature to consider. The partnership was dissolved by the articles; the accounts must therefore be taken, and, so far as the award has prescribed the manner in which such accounts are to be taken, I am of opinion that it is binding upon the parties, and that the Vice-Chancellor's decree has very properly directed the accounts to be taken upon the footing of such award. The appeal must be dismissed, with costs.



1839.

Nov. 16. 19.

1840.

Nov. 7.

Where a debtor has taken the benefit of the Insolvent

Acts, his creditors anterior to the insolvency have such an interest in his after acquired property as will enable them to maintain a suit in this Court, after his death, against his legal personal representative, for the purpose, at least, of realizing and protecting such after acquired property.

## WARD v. PAINTER.

**T**HIS was an appeal from an order of the Master of the Rolls, overruling a general demurrer to the Plaintiff's bill.

The argument and judgment on the demurrer are reported in the second volume of Mr. *Beavan's Reports*, p. 85.

The bill was a creditor's bill against the personal representative of a deceased debtor, alleging that the debtor had taken the benefit of the Insolvent Debtors' Acts, in respect of the Plaintiff's debt amongst others, but that he had afterwards acquired property, and then had died; and it prayed payment, out of his assets, first, of the debts contracted after the insolvency, and then of the debts contracted before the insolvency.

Mr. *Tinney*, Mr. *Wigram*, and Mr. *Teed*, in support of the appeal.

Mr. *Richards* and Mr. *Rogers*, *contra*.

The cases of *Jellis v. Mountford* (a), *Attorney-General v. Aspinall* (b), and *Browning v. Paris* (c), were cited, in addition to those mentioned in the argument of the case below.

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(a) 4 *Barn. & Ald.* 256.

(c) 5 *Mees. & Wels.* 117.

(b) 2 *Mylne & Craig*, 613.

*The* LORD CHANCELLOR.

This, being a general demurrer, can only be supported upon the ground of the Plaintiff's bill shewing that he has no right to sue; and, in this case, the bill being by a creditor against the representative of his debtor, the proposition can only be made out by shewing, either that the Plaintiff is not entitled to the character he claims, of being a creditor, or, secondly, that this Court has no jurisdiction to give him any assistance. The first point is not contended for: the bill alleges, and the demurrer admits, that the Plaintiff was a creditor before the debtor took the benefit of the Insolvent Debtors' Acts, and, certainly, the Insolvent Debtors' Acts do not destroy the antecedent debts. It did not require the decision in *Jellis v. Mountford* (a), or the authority of *Ex parte Barrington* (b) to prove this.

The title, therefore, of the Plaintiff, to the character of a creditor of the deceased, cannot be disputed, and the only question that remains is; Have the Insolvent Debtors' Acts taken from this Court the right and jurisdiction to interfere in any manner for the relief or protection of such creditors? for this bill contains allegations calling for the interposition of the Court for the protection of the property, unless these acts have deprived it of all its ordinary powers for that purpose; as it states that the Defendant, the personal representative, is insolvent, and threatens to receive the property, and to apply it to his own use, and to remove it beyond the seas.

By the acts, the rights of the creditors of the insolvent, at the time of his taking the benefit of the acts, is postponed to the claims of the creditors whose debts have

(a) 4 *Barn. & Ald.* 256.

(b) 2 *Mont. & Agr.* 255.

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1840.  
Nov. 7.

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PAINTER.

have been subsequently incurred; but, as to such subsequently incurred debts, there can be no doubt but that the jurisdiction of this Court remains unaffected by the acts; and if the creditors prior to the insolvency are interested in the subsequently acquired property, but only after payment of the debts subsequently incurred, have they not a right to call upon the Court to administer the property so as to discharge the subsequently incurred debts, for the purpose of ascertaining and realizing the fund in which they are so interested? and are they not entitled to the aid of this Court to protect it against the danger which the bill alleges to threaten it? Whether this Court will ultimately administer the surplus of the property amongst the creditors anterior to the insolvency, is not a question now to be decided. The effect of the recognizance and other provisions of the acts may be very important to be considered, when that question shall arise; but, for the present purpose, it is sufficient to express my opinion that the creditors antecedent to the insolvency have such an interest in the subsequently acquired assets of the testator as entitles them to the assistance of this Court, for the purpose, at least, of realizing and protecting the fund.

The case of *Barton v. Tattersall* (a) is an answer to the argument upon the Statute of Limitations.

I therefore affirm the order of the Master of the Rolls, and dismiss the appeal, with costs.

(a) 1 *Russ. & Mylne*, 237.

1839.

PRITCHARD v. FOULKES.

Nov. 25.  
1840.  
Nov. 7.

**T**HIS was a motion to discharge an order of the Master of the Rolls, suppressing depositions for irregularity.

Depositions, taken under a commission, suppressed, for irregularity, because, although the commission was intituled in an original cause and a cause of revivor, the depositions and the interrogatories upon which they were taken were intituled in the original cause only.

Two sets of depositions had been suppressed, viz., depositions taken by commissioners, and depositions taken by the examiner. In both cases they were taken on behalf of the same Defendant.

The question argued, upon the present occasion, was, whether the depositions taken by the commissioners ought to have been suppressed. The ground upon which the order for suppressing them had been made was that, whereas the commission under which they were taken was intituled both in an original cause and in a cause of revivor, the depositions themselves and the interrogatories upon which they were taken were both intituled in the original cause only.

The argument before the Master of the Rolls is reported in the second volume of Mr. *Beavan's* Reports, page 133.

Mr. *Cooper* appeared in support of the appeal motion, and urged that, if the defect were fatal, a new commission should be issued; and he cited *Curre v. Bowyer* (a) in support of that application.

Mr. *James Russell*, *contra*.

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(a) 3 *Swanst.* 357.

1840.

PRITCHARD  
v.  
FOULKES.

*The* LORD CHANCELLOR.

It appears, from the affidavits on behalf of the Plaintiffs, and is not denied by the Defendant, that one of the Defendants in the original cause having died, the suit was duly revived against his representatives; that the Plaintiffs afterwards obtained an order for a commission, which was intituled in both causes; that *John Foulkes*, one of the original Defendants, joined in this commission; that the commission, in the usual terms, authorised the commissioners to examine all witnesses upon interrogatories to be exhibited as well on the part of the Plaintiffs as on the part of the Defendants (naming the surviving Defendants to the original bill) in a cause wherein . . . (naming the Plaintiffs in the original bill), are Plaintiffs, and . . . (naming all the Defendants in the original bill), are Defendants by original bill, and wherein the said Plaintiffs (naming them) are Complainants, and . . . (naming one of the Defendants) and another are Defendants by bill of revivor.

Under this commission, the Defendant *John Foulkes* exhibited interrogatories for the examination of witnesses, but intituled them in the original cause only, and the depositions were intituled in the same manner. After the commission had been returned, and publication had passed, the same Defendant examined another witness before the examiner, and the interrogatories and the depositions were intituled in the same manner.

The authority of the commissioners was to examine witnesses in a cause consisting of the two bills, and not in the original cause only. This authority, therefore, has not been followed, and the depositions taken are irregular; and there is no doubt of the irregularity of the depositions before the examiner.

The

The Master of the Rolls thought these depositions irregularly taken, and has accordingly suppressed them. I am of the same opinion, and refuse this motion, with costs.

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PRITCHARD  
v.  
FOULKES.

WILLIAMS v. OWEN.

April 27.  
Nov. 23.

**T**HIS was an appeal from a decree made by the Vice-Chancellor of *England*.

The facts of the case are stated in the tenth volume of Mr. *Simons's* Reports, p. 386, and seq. They are also fully detailed in the Lord Chancellor's judgment.

The question was, whether a conveyance by the Plaintiff's father to the Defendant, in the year 1821, was to be considered as having been a mortgage, as contended by the Plaintiff, or as having been a sale, with a right of repurchase at a given day, long since passed, as contended by the Defendant.

The cause was argued, on the appeal, by Mr. *Wakefield* and Mr. *Koe* for the Plaintiff, and by Mr. *Richards* and Mr. *Cockerell* for the Defendant.

The authorities referred to were those which are mentioned in the report of the hearing in the Court below

A conveyance, as upon an absolute sale, accompanied by a contemporaneous agreement for reconveyance, upon payment, on a day certain, of the purchase-money, with interest, and of the expenses of the present conveyance, which had been paid by the purchaser: Held, on a bill for redemption, brought after the day certain had passed, to have been a sale, with a proviso for repurchase, and not a mortgage.

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*The* LORD CHANCELLOR.

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Nov. 23.

In 1821, the Plaintiff's father, *Richard Williams*, was absolutely entitled to the property in question, and he was, at that time, indebted to the Defendant in 200*l.*, which, from a passage read from the answer, is proved to have been secured by the bond of the Plaintiff's father and a surety. By indenture of the 14th of *June* 1821, reciting that *Richard Williams* had contracted and agreed with the Defendant for the absolute sale to him of the premises, at or for the price or sum of 550*l.*, such premises were absolutely conveyed to the Defendant, with a covenant for peaceable possession and enjoyment, and other covenants usual in conveyances to purchasers. It is made part of the Plaintiff's case that this conveyance was prepared by the Defendant's attorney, and at his instructions. This would prove nothing, except in aid of a case of fraud, if any such case had been attempted; and the Plaintiff, to prove this, produced the bill of costs for this conveyance, which appears not only to have been made out to the Defendant, but to have been paid by him.

On the same date as this conveyance, that is, the 14th of *June* 1821, an agreement was made and signed between the Defendant and *Richard Williams*, which recited the conveyance, describing it as an absolute conveyance, and that, upon the treaty for the sale of the hereditaments and premises, it was mutually agreed, that in case *Williams* should pay to the Defendant the like sum of 550*l.* within twelve months, and 13*l.* the expense of the conveyance, that then, and in such case, the Defendant would reconvey the premises to *Williams*; and it provided that upon such payment *Owen* would reconvey the premises to *Williams*, or consent to the conveyance being cancelled and made void to all in-

tents

tents and purposes; and that *Owen* should retain the rents from that day to the day of payment of the sum of 550*l.*, instead of interest, provided he preferred the same to lawful interest. It was also agreed that the rent should be apportioned from the 4th of *August* then next, and received, from that day, by *Owen*; and *Owen* engaged that if the sum of 550*l.* was paid on or before the 4th of *August* 1822, the conveyance should be cancelled, and the premises reconveyed.

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The Plaintiff did not go into any evidence as to the value of the property; but, on the part of the Defendant, *John Lloyd*, a surveyor and builder, and *Robert Williams*, a land valuer, deposed that the buildings consisted of eight small cottages, occupied by labourers, and that the rent, in 1821, was 50*l.* per annum, subject to repairs and loss of rent, and the value 548*l.* I pay very little attention to this evidence; the deed of the 14th of *June* 1821 recites *Richard Williams's* purchase, by which it appears that, in 1812, he bought the property for 330*l.*, and afterwards built eight dwelling-houses upon it, but which, by the evidence, appear to have been only labourers' cottages. It is clear that the rents far exceeded the interest of the 550*l.*; but, in property of that description, that might be the case, although the value did not exceed the 550*l.*

The Defendant took possession immediately after the execution of the conveyance. *Richard Williams* lived three years after that time, and left the Plaintiff his heir, who was under age till nearly the time of filing the bill.

The Defendant insists that this transaction was a sale, with an agreement for a repurchase, which was never acted upon. The Plaintiff insists that it was a mortgage; and of this opinion was the Vice-Chancellor.

The



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The case rests upon the facts I have stated, for although the bill alleges a case of fraud and misrepresentation on the part of the Defendant, there is no proof of it; and, on the contrary, whatever may have been the intention of the parties, there is, I think, no doubt of their having signed these instruments with full knowledge of their contents. The Defendant is described as a shopkeeper, and *Richard Williams* as a solicitor, and he must be supposed, in the absence of all evidence to the contrary, to have been fully aware of the nature of the transaction, and cognizant of his rights; but there is nothing in the case to shew that, at the time of the agreement, or at any time afterwards, during the three years of his subsequent existence, any thing passed between the parties which tends to explain their relative position. The case, therefore, must be decided upon the contents of the instruments themselves, with the aid of the few facts to which I have already adverted.

That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage, is, no doubt, true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not, of itself, entitle the vendor to redeem.


From the case of *Barrell v. Sabine* (a) this appears to have been recognized as a well known rule of equity above 150 years ago. The question always is — Was the original transaction a *bonâ fide* sale with a contract for repurchase, or was it a mortgage under the form of a sale? In *Mellor v. Lees* (b),

Lord

(a) 1 *Vern.* 268.

(b) 2 *Atk.* 494.

Lord *Hardwicke* puts the case thus: "As to the contract, whether it is a transaction that is in its nature a mortgage, or a defeasible purchase, and subject to a repurchase?"

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 v.  
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In *Goodman v. Grierson* (a), Lord *Manners* puts the case upon the same ground, and says: "The fair criterion by which the court is to decide whether this deed be a mortgage or not, I apprehend to be this, — Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" Tried by this test there would be no doubt that, in this case, the transaction was not a mortgage.

In *Ensworth v. Griffith* (b), the relation of mortgagor and mortgagee had existed, and the mortgagor, in consideration of the debt, and of a further sum paid, released the equity of redemption, and, at the same time, the mortgagee signed an agreement to reconvey the premises upon payment of the two sums within one year. A bill for redemption, brought in the Exchequer, was dismissed, and the dismissal was affirmed in the House of Lords. *Davis v. Thomas* (c) was very similar in its circumstances, and the same principle was acted upon.

In *Sevier v. Greenway* (d) Sir *W. Grant* said that if the case had rested upon the conveyance of *November* 1799, possession being taken, he did not see why it should be considered otherwise than as a sale. The transaction of *November* 1799 was an absolute conveyance, as to a purchaser, with a proviso for reconveyance to the apparent vendor upon payment of the purchase money within two years. Subsequent instru-

ments

(a) 2 *Ba. & Be.* 274.; see p. 279.

(b) 5 *Bro. P. C.* 184.

(c) 1 *Russ. & Mylne*, 506.

(d) 19 *Ves.* 413.

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ments between the parties described the premises as "standing upon mortgage," and, upon that, Sir *W. Grant* decreed a redemption.

Trying this case by the principle so long established, and settled upon such high authority, what is there to shew that this transaction was, in its origin, a mortgage, and not a sale, with a provision, under certain conditions, for a repurchase?

If the transaction was a mortgage, there must have been a debt; but how could *Owen* have compelled payment? It appears also that he, as purchaser, paid for the conveyance, and was, at all events, to be at liberty to keep the rents. There was, indeed, the want of every circumstance which, in other cases, has been thought necessary to give a purchase the character of a mortgage, and no proof of any intention having existed that it should be so considered.

In *Baker v. Wind(a)*, relied upon by the Plaintiff, it was proved that the parties had, throughout, treated the transaction as a mortgage, and had made it assume the appearance of a purchase to deceive the creditors of the mortgagor.

I am, for these reasons and upon these authorities, of opinion that the Plaintiff has not established any title to redeem, or to enforce the contract for a repurchase, and that the case, attempted, of fraud, has wholly failed; and that the bill ought to have been dismissed with costs; and such must be my order upon this appeal.

(a) 1 *Ves. Sen.* 160.

AN  
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TRUST, BREACH OF.

ADMISSION OF ASSETS.

Decree for payment of legacies, made against an executor, without reference to the state of the assets, upon the ground of his having, by his acts and admissions, rendered himself personally liable for the payment. *Barnard v. Pumfrett.* Page 63

AGENT.

*See* VENDOR AND PURCHASER.

TRUST (BREACH OF).

ALIMONY.

Husband and wife, who were separated, entered into an agreement in

writing, providing for their living together again, and stipulating that, in the event of a future separation for a particular cause, the wife should receive the income of her own fortune, which her husband was entitled to receive, and that her mother should indemnify him against her debts.

They afterwards separated, for the cause referred to by the agreement, and the wife obtained a divorce in the Ecclesiastical Court, and a sentence for permanent alimony to an amount exceeding the income of her fortune. That alimony was regularly paid by the husband, and he received the income of her fortune.

The wife accepted a bill of exchange in favour of a creditor of her own.

In a suit by that creditor, an injunction

injunction was granted to restrain the husband from paying to the wife the annual amount of the income of her fortune, as the validity of the agreement for future separation, under which she was entitled to such income, was not in dispute between the husband and wife.

Whether such an agreement would be held valid, if disputed, *quære*.

*Semble*, the Court will not interfere, either to compel or to restrain the payment of alimony, as such, except so far as to grant a writ of *ne exeat* against the husband. *Vandergucht v. De Blaquiere*. Page 229

#### ANNUITY.

*See* RESULTING TRUST.

#### APPOINTMENT.

A testator directed that in case of one of his daughters having no child, his trustees should stand possessed of a sum of 3000*l.*, and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned during the daughter's minority, upon such trusts as the daughter should by will appoint, and in default of appointment, or in case of appointment, as to such parts of the 3000*l.* as should not

be effectually comprised therein, or whereof the trusts to be thereby limited should expire, never take effect, or should determine, upon the trusts by his will declared, of his own residuary estate.

The daughter, having no child, by her will, after reciting that the 3000*l.* and the accumulated dividends had been blended with funds to which she was absolutely entitled, in a sum of 6700*l.* consols, standing in the names of trustees, proceeded, in express execution of the power, to direct that the 3000*l.* and the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to 2700*l.* consols, for her mother, and as to 250*l.* consols for another person, and as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, and all my monies, and securities for money, and all the residue of my estate and effects," to the same trustees, upon trust to convert and to invest in the funds such part as should not already be so invested, and to stand possessed of all such funds, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother and the other

other persons referred to, upon certain trusts, which she proceeded to declare.

The mother died in the daughter's lifetime.

Held, that the 2700*l.* consols was not well appointed, and that it was subject to the trusts declared by the testator of his residuary estate. *Easum v. Appleford.* Page 56

## ASSETS.

*See* ADMISSION OF ASSETS.

## AWARD.

Award of arbitrators enforced in equity, although the submission to arbitration was to be made a rule of a Court of common law.

Award enforced, although made after the prescribed time, where both parties had, without objection, allowed the arbitrators to proceed after that time.

Where an agreement provides that various things shall be done by respective parties, and that if any disputes shall arise with respect to them, such disputes shall be settled by particular persons as arbitrators, the award of the arbitrators need not embrace any more of the matters provided for by the agreement than are brought before them by the parties. *Hawksworth v. Brammall.* 281

## BALANCES (INTEREST ON).

*See* RESTS.

## CESTUIS-QUE-TRUST.

*See* TRUST (BREACH OF).

## CHARITY PROPERTY.

1. The decree of the Master of the Rolls, in *Attorney-General v. Fishmongers' Company (Kneseworth's Charity)*, 2 *Beav.* 151., affirmed by the Lord Chancellor; his Lordship being of opinion that the property was devised to the company, for their benefit, subject only to certain charges which, except in one particular, were declared illegal by the act 1 *Ed.* 6. c. 14., and there being no evidence that, in that one particular, the charge had not been properly satisfied. *Attorney-General v. Fishmongers' Company (Kneseworth's Will).* Page 11
2. The decree of the Master of the Rolls, in *Attorney-General v. Fishmongers' Company (Preston's Will)*, 2 *Beav.* 588., affirmed.

If there be no doubt of the origin and existence of a trust, this Court will not allow lapse of time to enable those who are mere trustees to appropriate to themselves that which is the property of others; but, in questions of doubt whether any trust exists, and whether those in possession are

are not entitled to the property for their own benefit, the Court will pay the utmost regard to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. *Attorney-General v. Fishmongers' Company (Preston's Will)*. Page 16

### CHATTELS.

*See* PERPETUITY.

### CONSIDERATION.

*See* CONTRACT.

### CONSTRUCTION.

*See* INSOLVENT DEBTORS' ACT.

### CONTRACT.

(*By whom to be enforced.*)

*A.*, by deed, contracted with *B.*, that, in consideration of 100*l.* expressed to be paid to *A.* by *B.* he (*A.*) would maintain, educate, and apprentice *B.*'s child, a boy of five years, and that if he had no child of his own, *B.*'s child should, in case of his attaining twenty-one years, have all his (*A.*'s) real and personal estate at his death, subject to a life interest for his widow.

It appeared, from the circumstances of the case, probable, that the apparent consideration of 100*l.* was not, in fact, paid, or intended by either party to be paid, and that it was stated in the deed *pro forma* only. There was some

evidence that the child was at *A.*'s house after the date of the deed, but it appeared doubtful whether the child ever lived with *A.* in the manner provided by the contract, and he soon after was residing with his father (*B.*), and the Court was satisfied that *A.* and *B.*, by agreement between themselves, abandoned the contract, and that the *status* of the child had not been altered by any thing done by *A.* in pursuance of the contract. Upon a bill filed by the child, after the death of *A.*, Held, that the contract, having been abandoned by the contracting parties, could not be enforced by the child.

Whether this Court would perform a contract by which a person, for a sum of money, deprives himself of the possibility of realising property which he can dispose of by will, and thus destroys an active motive for bettering his condition in life, *quære*.

Whether, if the contract had been so acted on by *A.* as to alter the *status* of the child, the child could have enforced the contract, *quære*. *Hill v. Gomme*. Page 250

*See* REVERSIONARY INTEREST.

### COSTS OF THE DAY.

*See* PARTIES.

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*See* VENDOR AND PURCHASER.

DEPO-

DEPOSITIONS (TITLE OF).

Depositions, taken under a commission, suppressed for irregularity, because, although the commission was intituled in an original cause and a cause of revivor, the depositions and the interrogatories upon which they were taken were intituled in the original cause only. *Pritchard v. Foulkes*.

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DISCOVERY (BILL OF).

A bill of discovery in aid of the defence to an action at law cannot be maintained against a person interested in the action, unless he is a party to the record at law.

In an action on a policy of marine insurance brought by the agent in whose name the policy was effected, the person named in the declaration as the real person assured is not to be considered a party to the record at law, so as to be liable to a bill of discovery. *Kerr v. Rew*.

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DISMISSAL OF BILL WITHOUT COSTS.

Bill dismissed without costs, upon motion, having been filed under a mistake, under which both Plaintiffs and Defendants were at the time. *Broughton v. Lashmar*.

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EQUITY FOR A SETTLEMENT.

See HUSBAND AND WIFE.

EVIDENCE.

A person who had guaranteed the payment of a debt secured by a second mortgage was tendered, in a suit relating to the first mortgage only, as a witness *vivâ voce*, before the Master, to prove that by certain dealings and transactions between the mortgagor and the first mortgagees, but to which he had happened to be a party, the first mortgage had been, in part, satisfied; and he stated on the *voir dire* that he had ascertained that the mortgaged property was sufficient to pay both the first and second mortgages: Held, that his evidence was admissible. *Wormald v. Mackintosh*.

Page 5

EXECUTOR.

See ADMISSION OF ASSETS.  
RESTS.

FAMILY.

See NEAREST OF KIN.

FEME COVERT.

See ALIMONY.

FISHMONGERS' COMPANY.

See CHARITY PROPERTY.

Z

HEIR.



**HEIR.***See* **RESULTING TRUST.****HEIR LOOMS.***See* **PERPETUITY.****HUSBAND AND WIFE.**

The assignee of an insolvent debtor, whose wife was entitled for life to real property, being obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being vested in mortgagees: Held, bound to make a provision for the wife. *Sturgis v. Champneys.*

Page 97

*And see* **ALIMONY.****INADEQUACY OF PRICE.***See* **REVERSIONARY INTEREST.****INSOLVENT DEBTOR.***See* **HUSBAND AND WIFE.****INSOLVENT DEBTORS' ACTS.**

Where a debtor has taken the benefit of the Insolvent Acts, his creditors anterior to the insolvency have such an interest in his after-acquired property as will enable them to maintain a suit in this Court after his death against his legal personal representative for the purpose, at least, of realising and protecting such after acquired property. *Ward v. Painter.* 300

**INTEREST (IN WITNESS).***See* **EVIDENCE.****INTEREST (ON BALANCES).***See* **RESTS.****ISSUE (PRO CONFESSO).**

Issue ordered to be taken pro confesso against a party who was to be Plaintiff in the issue, and who had neglected to proceed to trial of it at the time appointed by the order by which the issue had been directed. *Casborne v. Barsham.*

Page 113

**LAPSE.***See* **APPOINTMENT.****LEGACY (VESTING).****LAPSE OF TIME.***See* **CHARITY PROPERTY.****LEASE.***See* **PART PERFORMANCE.****LEGACY (VESTING).**

Direction to executors to apply 25*l.* per annum for the maintenance of testator's natural daughter, till twenty-one or marriage, which should first happen, when his executors were thereby required to pay to her 500*l.* She died under twenty-one, and unmarried. Held, that the legacy failed. *Watson v. Hayes.*

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**LEGATEE.**

LEGATEE.

See MISDESCRIPTION OF LEGATEE.

LOCO PARENTIS.

See PORTIONS.

LUNATIC.

An annuity of 100*l.* directed to be paid to the wife and son of a supposed lunatic, without reference to the master. *Conduit v. Soane. In re Gandy.* Page 111

MISDESCRIPTION OF  
LEGATEE.

Bequest to Lady C., widow of Sir N. C., considered valid, although at the date of the will she had married a second husband, R., and the fact of that marriage was unknown to the testator, and she continued to call herself Lady C.

The bequest was a bequest of a fund to trustees to pay to her the dividends so long as she should continue single and unmarried; and if she should anticipate such dividends, then the fund to become part of the testator's residue. Held, that she took an absolute interest in the fund. *Rishton v. Cobb.*

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MORTGAGE.

See REPURCHASE (PROVISO FOR).

NEAREST OF KIN.

A testator directed that upon the death, without leaving issue, of his daughter, who was his sole next of kin, a certain fund should be assigned to the nearest of kin of his own family for ever.

Held, upon the construction of the will, that these words meant to describe some person or persons to be ascertained at the daughter's death, and not the person or persons who should be his own next of kin at the time of his own death. *Clapton v. Bulmer.*

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NE EXEAT.

See ALIMONY.

NEXT OF KIN.

See NEAREST OF KIN.

OBJECTION.

See PARTIES.

OMISSION OF DUTY.

See TRUST (BREACH OF.)

PAROL AGREEMENT.

See PART PERFORMANCE.

PARTIES.

Where a defect of parties appears upon the bill, costs of the day

Z 2 will be

will be allowed to the defendant at the hearing, although he has not taken the objection by his answer. *Furze v. Sharwood*.

Page 96

### PART PERFORMANCE.

Specific performance of a parol agreement to grant a lease enforced against the intended landlord, on the ground of part performance, and on evidence consisting of a memorandum by the landlord, the parol testimony of a witness present, and the draft of a lease prepared by the landlord's steward, though the draft of the lease provided that the tenant should do an act for the landlord's benefit, which was not mentioned in the landlord's memorandum or the witness's testimony.

Observations on part performance as a ground for avoiding the operation of the Statute of Frauds.

Observations on the landlord's setting up as a defence that the tenant had done acts which would be breaches of the covenants of the intended lease. *Mundy v. Jolliffe*.

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### PERPETUITY.

A testator bequeathed chattels to trustees, upon trust to permit them to be used by the person or persons, who for the time being should be entitled to the possession of his mansion house under

his marriage settlement, or his will, until a tenant in tail of the age of twenty-one years should be in possession of his mansion house, and then the chattels were to belong to such tenant in tail.

The testator was, under his marriage settlement, tenant in fee, subject to some prior limitations, which all failed at his death; and, under his will, his brother became tenant for life, with remainder to his (the brother's) eldest son in tail, and died, leaving such eldest son then of the age of twenty-one years.

Held, that the gift of the chattels to the first tenant in tail who should attain twenty-one was too remote, and that the will gave the brother's eldest son no title to them. *Ibbetson v. Ibbetson*.

Page 26

See REMOTENESS.

### POLICY OF ASSURANCE (MARINE).

See DISCOVERY (BILL OF).

### PORTIONS (DOUBLE).

A grandfather having, in the opinion of the Court, placed himself *in loco parentis* to certain grandchildren, although their father was living, and having given them certain sums by his will, and having afterwards made settlements upon their respective marriages, the presumption against double portions was held to be applicable;

applicable; but inasmuch as the advancements were smaller in amount than the sums expressed to be given by the will, such advancements were held to be satisfactions *pro tanto* only of the gifts contained in the will. *Pym v. Lockyer.* Page 29

PORTIONS.

See REMOTENESS.

POWER (TRUST).

A testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed;" and, after giving the life interest in such stock and estates to his two children, with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of as aftermentioned, that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate, "amongst my nephews and nieces, or their children, either all to one of them, or to as many of them as my surviving child should think proper:" Held, that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of selection and distribution in his surviving child. *Burrough v. Philcox.* 72

POWER.

See APPOINTMENT.

PRACTICE.

See DEPOSITIONS (TITLE OF).

PARTIES (COSTS OF THE DAY).

DISMISSAL OF BILL WITHOUT COSTS.

PRO CONFESSO.

See ISSUE (PRO CONFESSO).

REMOTENESS.

Testator devised two estates to trustees for 500 years, and, subject thereto, devised one estate to his grandson *A.* for life, with remainder to *A.*'s sons in tail male, with remainder to *A.*'s daughters in tail general, with remainder to testator's grandson *B.* for life, with similar remainders to *B.*'s issue, and devised the other estate to *B.* for life, with remainder to *B.*'s sons in tail male, with remainder to his daughters in tail general, with remainder to *A.* for life, with similar remainders to his issue; and he declared the trusts of the 500 years' term to be that, in case either *A.* or *B.* should die without issue, whereby the survivor of them would become entitled to both estates, 2000*l.* should be raised for each of the testator's two granddaughters.

*A.* died, leaving a daughter, and then *B.* died without issue, whereupon

whereupon the two estates became united in *A.*'s daughter; but, as both *A.* and *B.* were dead, the event of the survivor of them becoming entitled to both estates did not happen.

Held, that if it was intended that the 2000*l.* should be payable in case of an union of both estates happening otherwise than in the lifetime of one of the two grandsons (*A.* and *B.*), such intention was too remote. *Case v. Drosier.*

Page 246

See PERPETUITY.

#### REPURCHASE (PROVISO FOR).

A conveyance, as upon an absolute sale, accompanied by a contemporaneous agreement for reconveyance, upon payment, on a day certain, of the purchase money with interest, and of the expence of the present conveyance, which had been paid by the purchaser: Held, on a bill for redemption brought after the day certain had passed, to have been a sale, with a proviso for repurchase, and not a mortgage. *Williams v. Owen.*

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#### RESIDUARY BEQUEST.

See APPOINTMENT.

#### RESTS.

Under a direction, in a decree, that the Master shall ascertain balances in the hands of a party at the end of each year, and shall

compute interest on such balances, and shall "in taking the said accounts" make annual rests, followed by a direction that the party shall be charged with interest "after the rate and in manner aforesaid upon such balances," the interest computed on the balance due at the end of the first year is to form part of the balance due at the end of the second year, and upon which interest is then to be computed, and so on, from year to year, to the end of the account. *Heighington v. Grant.* Page 258

#### RESULTING TRUST.

Estates devised to executors upon trust for the purposes after mentioned. The testator proceeded to direct a sale of the estates, and the division of the produce among his five children, after first reserving a sufficient capital, the interest arising from which should be sufficient to pay an annuity of 400*l.* to his wife for her life; but he did not declare any trust, at the wife's death, of the sum to be so reserved. Held, a resulting trust for the heir. *Watson v. Hayes.*

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#### REVERSIONARY INTEREST.

Purchase of a contingent reversionary interest set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad life, and was better

better known to the purchaser than to the vendor to be such.  
*Davies v. Cooper.* Page 270

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SATISFACTION (PRO TANTO)  
OF PORTIONS.

*See* PORTIONS.

SEPARATION DEEDS.

*See* ALIMONY.

SEPARATION (FUTURE).

*See* ALIMONY.

SPECIFIC PERFORMANCE.

*See* PART PERFORMANCE.

VENDOR AND PURCHASER.

STATUTE OF FRAUDS.

*See* PART PERFORMANCE.

SUPERSTITIOUS USES.

*See* CHARITY PROPERTY.

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TRUST (BREACH OF).

Half of a trust fund held on the trusts of a settlement of 1778 was re-settled by a settlement of 1791. In a suit to administer the trusts of the settlement of 1778, that half was, in the year 1809, ordered to be transferred to the trustees of the settlement of 1791. The transfer was never made, nor

was it ever applied for by the trustees of the settlement of 1791. In 1827 the parties beneficially entitled under the settlement of 1791 were adult and *sui juris*. The then present investment of the trust fund was, as it had for many years before been, an investment in *India*, subject to the control of the trustees of 1778; but those trustees were and had long been in *England*. The parties so beneficially entitled knew of and acquiesced in the investment, and never required that their half of the fund should be transferred to the trustees of 1791. The trust fund was afterwards lost by the failure, in 1830, of a house of business in *India*. Held, that the parties beneficially entitled were precluded from insisting that the trustees of 1778 were liable to make good the loss by reason of their not having made the transfer to the trustees of 1791.

Trustees in *England* held liable for the loss of a balance of money which they knew to be in the hands of a house of business in *India*, and not invested upon proper securities, although the *cestuis que trusts* had consented that the house in *India* should have the management of their affairs there; for it did not appear that the *cestuis que trust* knew that the balance, instead of being properly invested, remained in the hands of the house in *India*.

Distinction between the degree of knowledge and sanction necessary

sary to exonerate trustees from a breach of trust, and that which is necessary to preclude the *cestuis que trust* from complaining of an omission which, if concurred in by the *cestuis que trust*, did not constitute a breach of trust. *Munch v. Cockerell*. Page 179

*See* POWER.

### TRUST (ORIGIN AND EXISTENCE OF).

*See* CHARITY PROPERTY.

### TRUSTEES.

*See* TRUST (BREACH OF).

### VENDOR AND PURCHASER.

*C.* contracted, as agent of *A.* and *B.*, to sell an estate to *D.*, and received a deposit in part payment of the intended purchase money. *C.*'s agency was afterwards denied by *A.* and *B.*; and *D.* then filed a bill against *A.*, *B.*, and *C.*, praying a specific performance, and praying,

in the alternative, that, if he should be unable to obtain a specific performance, *C.* might be decreed to return the deposit, and to reimburse to the Plaintiff all the expenses of endeavouring to enforce the contract. The bill was dismissed, with costs, as against *C.*, as well as against *A.* and *B.*; and the dismissal was affirmed on appeal. *Sainsbury v. Jones*. Page 1

*See* REVERSIONARY INTEREST.

### WILL.

*See* PERPETUITY.

REMOTENESS.

APPOINTMENT.

LEGACY (VESTING).

POWER (TRUST).

NEAREST OF KIN.

MISDESCRIPTION OF LEGATEE.

### WITNESS.

*See* EVIDENCE.

THE END.

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